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THE STATE OF THE NATION

By ALBERT J. BEVERIDGE

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THE STATE OF THE NATION

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I

IN OR OUT

Our Foreign Relations: Isolation and the League: the Treaty and Its Offspring: Errors and Omissions: Armies and Obligations: Imported Publicity: Europe United: Washington's Wisdom Eternal.

Most American men and women want to do what is best for the American nation and all the people in it—and also to help the rest of the world as much as they can. So there is no sense in our being angry with one another because of differences of opinion as to the League of Nations, World Court, or, indeed, any question whatever, foreign or domestic, which arises from time to time.

We should work out our problems in good temper. In this spirit let us consider some of the matters which now disturb us.

Take, first of all, the various plans for our political

interference with international troubles. Should we go into foreign politics at all? That is the real question. The manner of going in is not important.

Once we are in, we are in—we can depend upon that. We shall find it hard to get out after we make the plunge, no matter what style of bathing suit we wear.

Of course, Europe wants us in on any pretext. Mr. Lloyd George declared in the House of Commons that "what really matters is getting the Americans in with or without the League of Nations." And the latest English book in defense of the League, published this year, admonishes the British people that "we should do everything possible to facilitate American adhesion to the International Court and participation in such League activities as may interest her. If we can do these things it is as certain as anything can be that in three or four years at most the United States will be putting at the service of the League all the immense prestige conferred upon her by her size and power," and so on.

In the shower of vituperation poured during the first League controversy upon those who upheld the American traditional policy of political detachment from foreign broils, two epithets stuck; and they have been more effective than all pro-League arguments put together.

IN OR OUT

"ISOLATION"?

"Isolationists!" That word found lodgment in the public mind. "We can no longer be isolated"; "we can no longer keep inside our shell"; "we must coöperate with other peoples to prevent war, since our war with Germany proved that we shall surely be a combatant in any future conflict," and so on.

Of course, the late war proved the reverse, as I shall presently show.

But how are we isolated? How have we ever been isolated? We never have been and most certainly are not now isolated financially. Foreign loans assisted us in the winning of our independence from Great Britain; foreign loans helped us finance the national cause in the Civil War; foreign capital aided mightily in the economic development of the republic—the building of railways and every form of industrial enterprise. It was the heavy investment of British capital in the Bank of the United States that so gravely alarmed Jefferson, and later in our history Jackson.

To be sure, all these foreign loans and investments were faithfully and promptly paid, with interest. Those who made them profited by them financially and otherwise.

On the other hand, the prodigal generosity with

which some $10,000,000,000 of the American people's money were shoveled into the hands of European Governments during the late war, is the most startling exhibition of financial expenditure in all history.

Even before we ourselves drew the sword, colossal loans amounting to billions were made with the consent of our Government, although neutral; and since the Armistice several billions—a powerful, trustworthy and fervently pro-League journal estimates the total at over $4,000,000,000—have been invested abroad in the form of loans, extension of credits, purchase of government and municipal bonds, and even industrial securities, as well as tangible property.

During 1923, American tourists left more than three hundred million American dollars in Europe—principally in France—and this flood of American money helped to keep the franc from sinking further than it did sink. Though these travelers spent their money for their own pleasure, the effect was the same as if they had invested it abroad.

When the Japanese earthquake came, American financial generosity was as opulent as it was praiseworthy. Very many millions, all told, have been spent by the Red Cross, the Society of Friends and other humanitarian organizations in feeding, clothing and medicining destitute European countries. Even

our Congress appropriated $20,000,000 for the relief of suffering Russians.

These examples prove that America is not now and never has been isolated financially. So we may check off from the dread word "isolation" the monetary phase of it. Surely America has done her part financially—there are able, informed and intensely patriotic Americans who think that America has done a good deal more than her part in this respect at least. Our citizens are reminded of it every time they pay their taxes.

Are we isolated commercially? Have we ever been isolated in business matters? Of course not! Witness the tremendous volume of imports, in spite of our tariff. On the other hand, although our exports are only a trifling per cent. of our total business, still American goods go to every corner of the world. We sold more farm products in 1922 than ever before in our history, and we are now exporting more foodstuffs than before the war.

Ocean freight rates are so much lower than rail rates that foreign markets are brought closer to our centers of manufacture than are many sections of our own country. If we would pay as much attention to over-sea trade as our rivals have paid, and are paying, we could easily increase our exports many fold.

Every transaction on the stock exchange of Chicago or New York is known almost instantly on the bourses of every foreign commercial city, and purchases and sales are made accordingly.

So we can check off business from the word "isolation," since it is obvious that America is not isolated commercially.

It is just as plain that we are not isolated socially—that fact is even more conspicuous than the others. The social relationships of Americans with people of foreign countries are far more numerous and intimate than those existing between the citizens or subjects of other nations.

International marriages—especially those of European men to American women—are so many and are so constantly increasing in number that the whole world comments.

So we may check off social intercourse from the word "isolation." What then remains? In what other respect are we isolated?

We are isolated solely and exclusively in the political sense—solely and exclusively in the sense that we are not mixed up in the quarrels, intrigues, plots, ambitions and hatreds of older countries; and we should bear in mind that all these alien antagonisms and aspirations—every one of them—have their roots deep in the soil of a distant past, deep in cen-

turies-old racial conflicts, deep in fundamental opposing interests.

The American people do not and can not understand any of these profound elements of the foreign situation, because without extensive and painstaking research and thorough and prolonged study, supplemented by intimate personal contact with those people, it is impossible to comprehend or even apprehend the various forces that move them.

This political aloofness is the only attitude in which America can, by any possibility, be said to be isolated. Yet is not this exactly the kind of isolation we want and ought to have for our own good? And that of the world also?

Suppose we did not have this political isolation vouchsafed us by our history, or traditions and, above all, by our geographical situation on the globe; is there anything we would not give to get it?

If some miracle were to place us in Europe, instead of being three thousand miles away with one of the world's greatest oceans between us, would we not deplore the change—passionately deplore it? Yet is not that the condition, as nearly as it can be humanly brought about, in which all the schemes for our political association with Europe would place us?

Or take it the other way round: Suppose that by

uttermost sacrifice any European people could exchange their situation for ours—cleansed as a people of all racial feuds, freed from historic national ambitions, cut loose from the meshes of intrigue, and transported far away to a new fresh land teeming with natural wealth, there to work out for themselves and their children a happy destiny under their own institutions of orderly freedom—would they not give all they possess to secure that blessing?

And if they could secure it, does anybody imagine that they could be induced to surrender, impair or imperil it?

Of course, they are not to be blamed for trying to get us to share their burdens and troubles—that is only human nature. Their diplomats could use us constantly as pawns in their never-ending national rivalries, as was done when they did get hold of us—as witness the performance at Versailles! In any case, would not the pretexts for getting money from us be multiplied in number and strengthened in plausibility? But is it sensible or prudent on our part to allow ourselves to be so used?

ONLY WHEN ATTACKED

Would not our risk of getting into future wars be increased by surrendering our traditional American policy of political independence? We are told that

we are in now "up to our necks," and that we shall be drawn into future wars just as we were drawn into the late war. If this is so, it is very important—perhaps decisively important. But is it so?

After the incredible blunder of the German High Command in attacking us and thus forcing us into the war, does anybody imagine that any other nation hereafter at war with another nation will repeat that tragic folly? In view of our demonstrated man power, financial might, physical resources and efficiency in the use of all these elements of military strength, is it thinkable that in the future any nation in deadly conflict with another nation will repeat the insanity of the German High Command?

Suppose Germany had left us strictly alone, would Congress have declared war upon her? Everybody knows that Congress would not have done so. Germany brought her defeat upon herself; and with that awful fate in the memory of all mankind—and it never will be forgotten—is it conceivable that any other nation will ever bring upon itself a similar catastrophe?

"IRRECONCILABLES"

And "irreconcilables." That stuck too. There is something forbidding about that word. It implies the reprehensible. It carries the suggestion that

those on whom it is branded are opposing, from unworthy motives, some noble purpose, some righteous plan.

But irreconcilable to what? Certainly not to American traditions, American interests, American institutions. On the contrary, irreconcilable to the admitted purpose to abandon American traditions; irreconcilable to the avowed plan to modify American institutions; irreconcilable to the conceded hazarding of American interests.

But is not that patriotism?

The fact that this very word "irreconcilable" was stamped upon George Washington when he scorned the British offers of conciliation in 1778–9 makes that word rather stale, does it not, when used one hundred and fifty years later—and especially when employed against the advocates of Washington's policy? The British urged us to end our Revolution on our own terms, excepting only separation from the British Empire. When Washington and the Continental Congress refused, blistering epithets were applied to them, the least offensive of which was this very word, "irreconcilable."

So let us have done with these and like unsavory and misleading terms and get down to the real question: Is it best for us—or the world—to scuttle our traditional American policy of political detachment

from foreign controversies and engage in world politics? If it is, let us do so whole-heartedly and with good will, as becomes Americans.

RACIAL GROUPS AND SOLIDARITY

As I look at it, the basic fact of American life makes it impossible—at least disastrous—for us to have any political connection whatever with old and alien peoples.

What is that basic fact of American life? It is the racial structure of our population. We Americans are not yet racially homogeneous; as yet we are racially heterogeneous.

Speaking by and large, the people of France are French; of Italy, Italian; of Germany, German; of Holland, Dutch; of Spain, Spanish; and more than one thousand years have been necessary to compound the inhabitants of England, Scotland and Wales into the British people.

But racially we Americans are everything. Moreover, no one racial group among us now outnumbers all the others. American citizenship includes millions of Italian blood, more millions of Scandinavian blood, still a larger number of Irish blood, a much larger proportion of German blood and so on. Belgium, the Balkans, Greece and Russia, taken

together, have contributed some two million to our variegated citizenship.

All this may be a good thing or a bad thing; but, be that as it may, our job is cut out for us. That job is to weld these diverse racial groups into an ethnological unit. It is no less an undertaking than the creation of a people, in the sense that the French, Germans, Dutch, Italians, Spanish and British are peoples.

Very well! So long as we attend exclusively to American affairs and look after American interests solely, the welding of our racial groups makes reasonable progress; in fact, it goes on rapidly in comparison with the long centuries of British amalgamation, for example.

Practically all our citizens of so-called foreign blood want to be good Americans, and are good Americans and nothing but Americans, so long as America attends to her own business; and, even when she meddles with foreign quarrels, these citizens think that they are still good Americans when they take the side of the land of their origin.

Intermarriage, business intercourse, mutual interests, a single language, rapid transit, common schools and many other forces make for American racial solidarity and the resultant of a homogeneous people. All this proceeds quite naturally until our Govern-

ment, without being attacked, interferes in foreign political altercations.

But when, without any assault being made on American interests, rights or honor, our Government takes sides in alien quarrels, the welding process ceases; our dissolving racial groups snap into line according to the blood in their veins; and they think, act and vote not upon American considerations, but upon foreign considerations—which is intolerable.

We saw this in the last presidential election. For example, Mr. Wilson by his stand on Fiume lost to the Democratic Party the bulk of the Italian vote; yet what did it matter to American interest, ideals or policy whether Fiume went to Italy or Jugo-Slavia? Nothing, of course, but it mattered decisively to our citizens of Italian blood—that was merely human nature and they are not to be blamed for feeling as they did.

Other and even more conspicuous manifestations of racial group voting occurred in the same election. And the worst of it is that these racial groups honestly believe that the interests of America and the interests of the foreign country they favor are identical interests.

If this sort of thing were to become habitual, would it not make impossible—or at least greatly retard—

that national unity and ultimate racial oneness so indispensable to our happiness and prosperity as a people? But if we keep out of political interference abroad, our unifying forces will go on working out our racial solidarity.

The compactness of our people, when Congress declared war on Germany, illustrates the point. We were more united then than in any war we ever waged. The casualty list—the death roll—showed that our heroes were of every racial blood in America.

Why? Because America had been attacked, as Congress declared—on that ground we were a unit. But, if Congress had put its declaration on other grounds, would there have been such a response? Indeed, would the Selective Draft Act have passed at all?

DIPLOMATS—AMATEUR AND PROFESSIONAL

Even if this determinative situation—this basic fact of American life—did not exist, we could not go into foreign alliances, concerts, associations or leagues except at grave disadvantage. Our sytem of government, our party methods, our political practises seriously handicap us.

Our fixed and frequent elections; our custom, now developed into an institution, of electing representatives and senators only from the districts and

states in which they live; and other elements peculiar to America, prevent continuous public service. In other countries statesmanship is a life career.

Moreover, our system compels our public men to think in terms of locality—they must look after the local interests of their immediate constituencies. It is not easy for them, nor have they time, to study thoroughly and give prolonged thought to foreign complications. Even if they could do so, the uncertain and at best comparatively short period of public service curtails their usefulness.

This brevity of official life, inexperience and lack of long-accumulated information are true to an even greater extent, of our diplomatic establishment. Compare the length of service of our secretaries of state and ambassadors with that of many senators and representatives.

Therefore we have few trained diplomats to meet the finished professionals of old nations. So it has come about that, notwithstanding the great ability of our men, we have been beaten, with very few exceptions, in our more important diplomatic encounters. From this fact has come our popular saying that "America never lost a war or won a conference."

Of course, we can and will cure this in time—we have made a good beginning already—but had we

not better keep out of unnecessary diplomatic complications until we are equipped? To be sure, we must make treaties with individual nations from time to time; but for the most part these are commercial and not vitally important, seldom political and of grave consequence.

Is not the making of such agreements quite different from and far simpler than entering into a political combination for political world management—especially when the other members of that combine are in frequent antagonism with one another over conflicting policies and interests and therefore playing for the votes and influence of other members?

We must remember, too, that we are now so strong and rich that henceforth older nations who want to use us will set to that task their very ablest, most experienced and highly trained negotiators. Is it sensible to go into a continuous and unending political game with such men, when we are represented by agents who, however talented, are, in the main, without any large experience, much training or long-accumulated knowledge?

But let us not press this point, so unwelcome to our self-esteem. The main question is: Ought we in any case to become a member of any foreign political contrivance? Can any device of the kind be made practical, wise or righteous?

THE LEAGUE OF NATIONS

The existing League was framed by very able men —one, Mr. Wilson, uncommonly able and thoroughly sincere. Yet what a mess they made of the covenant! And is it likely that anybody else could devise a better international machine?

To be sure, sarcastic comment is being made of late on the whole proceedings at Versailles. For instance, the most recent British author brilliantly to defend the League, Mr. Roth Williams, remarks that our "great statesmen left it to President Wilson to be good, and showed themselves infernally clever at proving that the fourteen points meant the Versailles and other peace treaties."

Nevertheless, Mr. Williams thinks the League a noble institution and explains our failure to appreciate it by observing that "American society is still an essentially pioneer society."

The League was inherently unworkable, since, if it had functioned as designed, it would have created a superstate whose decrees offending nations would have had to obey or have war made on them by the other nations of the League. In his masterful and unanswered analysis of the League constitution, the late Senator Philander Chase Knox, of Pennsylvania, pointed out that the League covenant sanc-

tions war in six cases and makes war mandatory in three other cases.

Worst of all, the purpose of the League is to preserve the *status quo* of the world as framed in the Treaty of Versailles.

"The League, as organized at present, is part and parcel of the settlement of East Europe," explains Roth Williams in his thorough exposition of the League.

Professor John Dewey points out that "hardly a clause in it—the covenant—is free from the iniquities of that treaty."

"How," said Mr. Otto Kahn in a recent address, "are you going to get away from the congenital taint of the League, which consists in its being attached to and made the preserver and guardian of the war settlement," and which exists only "to perpetuate the structure of the peace treaties?"

IN THE COURT, IN THE LEAGUE

And that, too, is the idea behind the so-called World Court, which is created by the League, elected by the League, paid by the League, advises the League, and, as Lord Robert Cecil is reported—without denial—to have admitted, is "an auxiliary of the League."

Mr. Williams in his plea for the League informs us that "the court, the council and the assembly are the primary organs of the League."

Here is the official record of the genesis and birth of the court: Article 14 of the League covenant requires the League council to submit to the League members plans for the court; accordingly, the League council secured jurists to frame the statute creating the court; the League council approved this statute, which, after radical amendment, was approved by the League assembly and, in the form of a protocol, ratified by a majority of the League.

This statute says that the court is "established in accordance with Article 14 of the Covenant of the League of Nations"; that the judges of the court shall be elected and paid by the League; that the number of judges may be increased by the League; that vacancies in the court shall be filled by the League; that "the jurisdiction of the court comprises all matters specially provided for in treaties and conventions in force"—that is, the Versailles compact and other war and postwar arrangements; "all cases which the parties refer to" the court; and, "in the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court."

Moreover, the League covenant itself makes the

court the legal adviser of the League "upon any dispute or question referred to it by the council or by the assembly." And the statute declares that the ratifying members of the League may recognize "as compulsory the jurisdiction of the court in all and any of the classes of legal disputes concerning," among other things, "any question of international law."

We see, then, that the Versailles Treaty and the League of Nations are the parents of this World Court. So would it not appear that, if we are in the court, we are in the League?

It is proposed to go into the court and yet keep out of the League by declaring that we will be represented in the League only for the purpose of electing members of the court; but, if we sit in for one purpose, is it not human nature that we will sit in for other purposes and finally for all purposes?

Is it any wonder that the late Senator Knox exclaimed when he first saw this court statute in the newspapers—and many times afterward:

"They'll pull us into the League yet by the coat tails, through the back door, if we don't watch out!"

Even if we did not enter the League formally—except to elect the court—but did go into the court, would we not be bound—morally and legally bound—

to accept and support the decisions of the court, whether or not we were a party to the cases decided? If so, one has only to survey the scope of the court's jurisdiction and duties to realize what that would involve.

And consider cases to which we might—and probably would—be parties: For instance, take our pending controversy with other nations about ships bringing liquor into our ports even under seal. The majority of our Supreme Court decided that they could not; while two justices in a dissenting opinion said that they could, because international custom and the comity of nations require it.

This is a plain question of so-called international law, is it not?

Very well! If that question were taken before the World Court, we being a member, what would happen? If the World Court decided that foreign ships can bring in liquor under seal, would we submit? If so, the World Court would have successfully overruled the Supreme Court of the United States in the interpretation of our national Constitution. If we did not submit, would we resist? If so, how? By arms?

As to cases to which we were not a party, but the decision of which, as an adherent of the court, we would have to support—look again at the jurisdic-

tion, set out above, of this curious but cleverly contrived tribunal.

Aside from these grave and obvious perils, is it not plain that to go into a court which is "a primary organ of the League" is to go into the League itself?

Reservations! These can not save us. When the first League fight was on, the leading American newspaper champion of the League said that, as a practical matter, the stringent reservations then offered amounted to nothing.

That devoted champion of the League, Professor Manley O. Hudson, wrote not long ago that "I care little about the nature of the American reservations."

Our states made reservations in the form of amendments to our Constitution. Every student knows that it would not have been ratified if at the time those reservations had been understood to mean what they were long afterward construed to mean. Dispute as to the true interpretation of one of them was a powerful cause of our Civil War. So let us dismiss reservations—they are merely a smoke screen, though, of course, not so intended.

To return to the League and its operations: If the League had functioned as planned, it is obvious that America did well to keep out of it: if, on the other hand, the League has not functioned as planned —if instead it has developed into either a debating

society or mere tool of the major powers, to be used or ignored as their interests require—then most assuredly America should have nothing to do with it.

The League has done one or two good things, such as the settlement of the dispute between Sweden and Finland—a matter which would have yielded to ordinary diplomatic treatment, however, and at worst was not very weighty, not nearly so grave as has been represented to us.

ERRORS AND OMISSIONS

But on the whole the League has failed to meet the very crises which we were told it would master. Look at the Ruhr! That was an ideal case for the League; yet it did nothing. It could not do anything, since its two predominant members were in violent disagreement.

So the dragon's teeth have been sown more deeply and thickly than in the memory of man, precisely as the late Lord Bryce foresaw and foretold.

Lloyd George laments that "had America been in, America and Britain, acting in concert with an openly sympathetic Italy and a secretly assenting Belgium, would have brought such pressure to bear on France as to make it inevitable that the League should act" in the Ruhr.

There you have it! And, of course, at some other time, America acting with France, and secretly supported by other powers, would doubtless bring pressure to bear on Great Britain. A lovely prospect, is it not? A very culture bed of intrigue.

Take the war between Greece and Turkey. The League took no steps to prevent it, did not lift a finger to stop it. Yet is not that what the League was created to do? We Americans thought so. We were told so.

And why this resurgence of Turkey? What has happened that this beaten antagonist of "civilization" is again on top and getting what she demands? No reparations from Turkey! No suppression of Turkey! No dismemberment of Turkey! Quite the contrary! As to Turkey, it is "By your leave" and "What can we do for you?" It is all very puzzling, is it not?

Professor Dewey is characteristically accurate when he asserts that "the war-breeding issues in Europe are obviously reparations, the Ruhr and the Near Eastern question. None of these questions has even been touched by the League."

The dispute between Greece and Italy was exactly the kind of emergency the League was created to handle. Lord Robert Cecil declared before the League council that the League was fully competent

to take up and dispose of the matter—which was entirely true, of course, if the League is anything more than a puppet of the great powers.

Yet Mussolini defied the League, which, according to press reports, first thought of appealing to its World Court to tell it what its powers really are; but finally laid the matter before a committee of jurists. Amazing, is it not, that after three years even the council of the League do not themselves agree upon the meaning of the covenant that created the League?

And yet is it so astonishing after all? It took three-quarters of a century and a terrible war to settle the rights and powers of states and nation under our Constitution, and the interpretation of that instrument still goes irritatingly on. Yet the American Constitution is a plain and simple document compared with the covenant of the League of Nations. Do we want to go into an organization created and governed by such a charter, even if that organization acted faithfully under it?

For the League has not only evaded its duty in the gravest possible situations but it has done some very bad things. Take the Saar Valley, for instance. The Versailles Treaty provided that the inhabitants of that little region should be governed by an impartial commission appointed by the League, respon-

sible to the League and removable by the League, with salaries fixed by the League; that "there will be no military service" in the Saar, and that there shall be "only local gendarmerie for the maintenance of order" in the Saar.

What happened? France appointed one M. Rault president of the Saar; and a French military force occupied the Saar—national troops in international territory, in which there was to be only local gendarmerie! This was long before the armed occupation of the Ruhr and had nothing whatever to do with the exactment of reparations.

Then the League council appointed its "impartial" commission, the majority of which is made up of one Frenchman, one Belgian and one Dane who has lived in Paris for nearly twenty years. The nations constituting the League council are mostly and usually—especially when any big matter is before the council—represented in the meetings of that body by their ambassadors to France, who, of course, officially and actually reside in Paris.

Some months ago this majority of the Saar commission, or its president, issued a decree which, among other things, directs that anybody who casts discredit on the treaty, the League or the commission shall be liable to five years' imprisonment or a heavy fine.

Versailles, League and commission all made sacrosanct by a commission ukase!

Still, when the League was compelled at last to take up the matter, it reluctantly whitewashed the proceeding, which led a prominent British liberal journal to declare "the League acts like an organized hypocrisy."

Thereupon Mr. Asquith, former premier of Great Britain and still leader of the Liberal Party, rose in the House of Commons and "trembling with indignation," as the newspapers described him, thus passionately denounced this Saar decree:

"Even in the annals of the despotism of the worst days of Russia, a more monstrous or oppressive piece of legislation could not be discovered and yet this decree goes forth to the world under the authority of the League of Nations": and Mr. Asquith declared that Great Britain should "demand a special meeting of the League council and, backed by all the free countries in the world, insist on canceling this scandalous decree, which besmirches the authority and reputation of the League."

It would almost seem that, in practical effect, the Saar is ruled by France and not by the League—which may be all right, except that the treaty requires the Saar to be governed by the League.

THE DEVIL'S ORCHESTRA

The League was to have reduced armaments and, in general, soothed irritations. Yet with Germany and Austria entirely disarmed, Hungary well-nigh disarmed, and Bulgaria partly disarmed, there are over 1,000,000 more soldiers under arms in Europe to-day than before the war broke out in 1914; and hatred, rivalry, greed, suspicion are more virulent now than ever before in the whole history of Europe.

Let no American be deceived by rosy reports of accommodations, adjustments, consortiums and the like. The future will reveal such arrangements to be mere patchwork. Lloyd George truly says that "The inflammable spirit of hatred and revenge saturates Europe."

The devil's orchestra is again being assembled.

Disarmament! According to the figures of our War Department, France spent in 1923 on her army and navy 4,754,835,525 francs—a heavy increase even considering the slight depreciation of the franc when this outlay was made. The French air fleet, largely built since the Armistice, is reported to number 1400 war planes; and each year hundreds of millions of francs are devoted to enlarging this mighty force.

ARMS AND DEBTS

Or take the nations created at Versailles. Perhaps the most careful and accurate study of European armed establishments yet made is that of Major General Sir F. Maurice, K. C. M. G., C. B. Speaking of the whole situation generally and of these newly incubated governments in particular, he says:

"The strength of the standing armies of Europe in 1913 was 3,747,179 men. In 1922 the strength was 4,354,965—an increase of 607,786—despite the compulsory reduction of 696,135 men in the standing armies of Germany, Hungary and Bulgaria. This means that in the remaining states of Europe there has been in 1922 an increase of 1,303,921 as compared with 1913.

"To-day the standing armies of Poland and of Rumania are larger than the standing army of Italy, while those of Czecho-Slovakia and of Jugo-Slavia are not much inferior. The burden of military service falls upon the peoples of the new states far more heavily to-day, when they have obtained their freedom, than it did when they were under the rule of the Czar, the Kaiser and of the Austrain emperor.

"In the days when the territory which is now Czecho-Slovakia was governed from Vienna, it contributed to the standing army of Austria a quota of 73,000 men. To-day Czecho-Slovakia maintains an

army of 160,000 men. The incidence of military service upon her people is therefore more than twice as heavy.

"The territory of the new Poland was, before the war, partly under German, partly under Austrian and partly under Russian rule. It then found 190,000 men for the standing armies of those three great military powers. To-day Poland has a standing army of 275,000 men. Finland before the war provided 30,000 men for the army of the Czar; she now has an army of 120,000."

The appalling military statistics prepared by our General Staff, which are up-to-date and accurate, substantially confirm the above figures as to soldiers actually on duty; and also give the number of men in the "organized reserves" of these countries which runs into many millions. This compilation looks like a jungle of bayonets, machine guns and cannon enclosing mountains of shells, cartridges and other devices of death. And all this in time of peace!

As Mr. Roth Williams says: "The war brought to life as sovereign states a number of small nations, some of whom had never been independent before and most of whom had been submerged for centuries." And here they are, already taxing their people more heavily for war purposes than ever those people were taxed before in all their sad history.

The eminent Italian publicist and statesman, former Premier Nitti, reminds us that sixteen new countries were carved out of Europe by the Versailles Treaty, and thousands of miles of new frontiers erected. This is sixteen fresh causes of wrangling, dispute and war. If not, why this incredible outlay by these very governments for their military establishments?

But the money wrung from these "liberated people" by taxation is not enough to keep up the prodigious armaments loaded on them by their "free" governments—sums amounting to hundreds of millions of dollars, computed in American money,—and in reality our money,—have been loaned these infant nations by France, largely to keep up their military establishments.

Some time ago a great pro-League American newspaper, of immense circulation, printed a Paris dispatch that "French liberals are preparing to protest against further governmental loans to arm Central European powers as France's gendarmes. Advances of 800,000,000 francs to Poland, Rumania and Jugo-Slavia will be proposed to the Senate." But these French 'liberals" will protest in vain—they are weak to powerlessness and utterly without influence.

All of these mammoth loans already made to these newly set-up countries and the additional

largess to be given them hereafter for military use, are American money, since the debt to the United States is unpaid—even the interest on it is unpaid.

Doubtless European countries have good reason for this appalling disbursement for war purposes; it is not for us to criticize them, except that it naturally appears strange to us that such tremendous expenditures should be made in peace times, with Germany absolutely disarmed—as the French General Nollet, chief of the Disarmament Commission, has formally reported after a thorough search—while some of the very governments that are pouring out this swelling volume of wealth on armies are insisting, and making many of us believe, that they have no money to pay their debt to us or even any of the interest on it.

But the point which I am now making is that, whereas the League was to have reduced armaments, war equipment has actually been increased by members of the League itself. And let us not forget—it can not be repeated too often—that these increased European armaments have been built up and are being maintained by our money. If the debts due us were paid, those debtor governments would have no cash with which to keep up large military establishments.

Then the League was to have exterminated secret

diplomacy—all treaties were to have been registered with the League. But has that been done? When desirable it was avoided quite easily, not to say contemptuously. Take, for example, the secret arrangements between France and Poland, Jugo-Slavia, Rumania, and perhaps other countries on which were based the mammoth loans mentioned; these loan agreements are called memoranda—and so they are not registered with the League. And God only knows how far that sort of thing has been carried or by what nations.

HAD WE GONE IN

It is said that if we had gone into the League all this would not have happened. Why not? If the rivalries, jealousies and antagonistic interest of its principal members prevented the League from acting as the covenant requires, how could we have removed causes of League paralysis? By the cancellation of debts due us from leading European nations, together with the making of further mammoth loans of other billions of dollars?

Is not this the crux of the whole matter, so far as America is concerned? We constantly hear that reparations and mutual cancellation of debts—which means in the end that America does the canceling—are "inextricably intertwined." You can not talk

to any European about conditions in the Old World but that he soon comes round to the subject of our canceling the debts Europe owes us.

And we shall hear more of it—much more. Billions are involved; not only the billions morally and legally owing to the American people, but other billions of European government securities, which would be tremendously increased in market and actual value if those governments could get out of paying their debts to us.

Has anybody heard of any proposition to cancel the billions of debts which these very same governments owe to American banks, corporations, firms, individuals and other private interests?

No! The only cancellation suggested—and urged—is the billions due to the American people.

Great Britain got territory—virgin territory of immense potential wealth—equal in area to more than half of that of the United States. France got the richest mineral deposits of Europe and now owns more iron lands than exist in the remainder of the Continent and the United Kingdom combined; Syria; and tremendous reparations, even if no more is ever paid. In practical effect Japan got the North Pacific. Rumania, Jugo-Slavia—but why go on?

We got nothing but a tremendous debt which will require generations to pay off. That is all right;

we do not complain. Nor do we object to the material gains of the European victors. But does it all look like "a brotherhood of arms in a common cause"? Yet that is the ground and the only ground upon which a cancellation of the debts to us can be urged, either morally or legally.

How, otherwise than by canceling debts due us and making further colossal loans, would our membership in the League have prevented the forbidding events which the League was to have handled, but did not?

Would Germany, merely because as a member of the League we told the League to tell Germany to do so, after paying a large sum,* with her colonies gone, her commerce impaired, her best iron and coal fields

* As I write (Sept., 1923), the newspapers carry a Paris dispatch that the Reparations Commission has issued "revised figures" showing "that Germany has paid in cash and material $1,642,144,000."

That able and brilliant champion of French policy, Mr. Frank H. Simonds, explains, October 7, 1923, that "This Commission has been in recent months wholly in Franco-Belgian hands."

On April 15, 1923, the late Charles Henry Grasty of the *New York Times* estimated the total sum paid by Germany up to January 1, 1923, at $3,850,000,000, exclusive of the German merchant marine handed over to the Allies, the Saar mines and other items.

The Oxford University debating team recently in the United States publicly stated in their notable debates that up to the present time Germany has paid on the "reparations" account $5,000,000,000 exclusive of colonies, merchant marine and other war deliveries. Undoubtedly these young Englishmen from Oxford have secured the latest, most accurate and trustworthy figures.

taken, her navy surrendered, her merchant fleet appropriated, have immediately produced and paid over other billions which she insists she has not and can not get?

Would France, merely because as a member of the League we advised the League to advise France not to invade the Ruhr, have refrained on that account from carrying out her carefully formed plans, especially if those plans have a vital political purpose?

Would Italy have stayed her hand in the Greek matter, because we as a member of the League admonished the League to admonish Italy to let the League settle that dispute? In that affair Mussolini had and has behind him the whole Italian people. Many intricate and momentous questions were involved in the Greco-Italian muddle. Let us not go off half-cocked on this tangle or on any other European complication.

Would the Balkan nations have become peaceable just because we as a member of the League insisted that the League insist that they suppress racial hatreds that have been growing for centuries?

And if the League had acted on our judgment, but any nation or nations had ignored the League's orders, how would the League have enforced those orders? By military strength? Where would the League have got soldiers and munitions? Not from

any European nation, little or big—events have proved that.

Should we then have supplied those soldiers and munitions?

So there would appear to be nothing in the assertion that all would now be right in Europe if only we had entered the League. Indeed, if we had entered the League, would we not now be mixed up in all sorts of trouble?

Again to quote Professor Dewey:

"A Europe which is divided against itself on every important issue is not a Europe in which we are likely to reduce appreciably the risk of war, and it is a Europe in which we intervene at our own peril, at the peril of becoming entangled in the old problems of the balance—that is the preponderance—of power."

A UNITED STATES OF EUROPE

The question often is asked: If our states could give up their mutual antagonisms, compose their conflicting interests and form a peaceable Union, profitable and beneficial to all their people, why can not European nations do the same thing with like results? This is a fair question and requires—and deserves—a frank answer.

Before our Constitution was adopted our states

were, in theory, nations; but actually they were one people. They spoke the same language, had practically identical institutions and similar interests. In order to combine into one great nation, our states voluntarily surrendered to a central government vital powers such as those over the tariff, coinage and currency, immigration, treaties and the like; and they conferred on the general government other vital powers, such as internal taxation, improvement of rivers and harbors, the making of war, interstate and foreign commerce, and so on.

Would European nations surrender such powers to a central government and thus create a United States of Europe? Even if such a miracle were performed, would it endure? Would not the different languages, customs, habits of thought, basically hostile interests, racial antagonisms and jealousies—hundreds and sometimes thousands of years old—tear such a structure to pieces?

Another point more serious than any other—except the racial structure of our population and the effect upon it of our political meddling in European broils: As a member of the League or participant in any political combination abroad, foreign propaganda from which we even now suffer so severely would become much more active.

In order to get on their side our representatives in

the League or other international combine, interested European governments would redouble and quadruple their efforts to influence American public opinion. That is not guesswork, but merely a fact of human nature.

IMPORTED PUBLICITY

As it is, foreign propaganda is by far our greatest danger. Ever since our Revolution the United States has been the most propaganda-ridden country on earth. But if we were a member of an international political partnership, with a vote, how much more powerful and active would be the effort to influence that vote by influencing American public opinion!

This very evil of foreign propaganda was one of the controlling reasons for Washington's Farewell Address.

It was this very foreign propaganda that the Father of our Country was combating when he declared that "passionate attachments for some nations and inveterate antipathies" to others would be fatal to America.

It was to this very foreign propaganda that Washington directed his axiom: "The nation which indulges toward another an habitual hatred or an

habitual fondness is in some degree a slave—a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its true interests."

It was out of his own bitter personal experience that he asserted, with uncharacteristic feeling, that "real patriots, who may resist foreign intrigue, are liable to become suspected and odious, while its tools and dupes usurp the applause and confidence of the people, to surrender their interests."

As everybody knows, the sum of Washington's advice in his immortal address—one of the wisest and most farseeing documents ever written, if indeed it is not the ablest state paper of all time—is honorable friendship with all nations, political connection with none.

All Americans now see how sound and necessary the Farewell Address was when it appeared. Is it not infinitely more sound and necessary to-day?

Then our population was comparatively homogeneous—contrasted to our present situation, there were then practically no racial groups; now our population is, in contrast, heterogeneous—we are made up of racial groups.

Then foreign propaganda was by word of mouth, correspondence, a few newspapers; now foreign propaganda uses the stage, the screen, the lecture

platform, the school, the pulpit, and all the myriad methods of influencing public opinion; and ours is preeminently the age of publicity.

Foreign propagandists, in one guise or another, swarm over the land. Consider the eminent foreigners who have recently come to us and told us what to do—and others are coming.

That may be all right. It will prove to be innocuous, provided we recognize it for what it is, and keep our Government clear and clean of all foreign political entanglements.

It is vital for us Americans to have in mind all the time, and especially when listening to foreign propagandists or reading their printed matter, these two simple but fundamental facts:

Foreign propagandists always strive to serve and advance the interests of their country, never the interests of our country. And, *It is a first condition of their success that they make us believe that the interests of their country and the interests of our country are identical interests.*

Far worse than foreign propagandists themselves are those Americans who, for one reason or another, become attached to particular foreign countries. Whether they know it—and of course most of them are guileless—they are playing the game of their favorite and are much more effective than the agents

of the foreign government engaged in propaganda work.

FOR THE GOOD OF THE WORLD

That is our situation now. But suppose that we were a member of the League or any other political contrivance among nations, with a vote and the attending responsibility: Can not any one see that, disturbing to our composure and disruptive of our national solidarity as foreign propaganda among us now is, when we are not in the League or court and have no vote, how much worse it would be if we were in any foreign political association whatever and had a vote with the commitments and responsibility that would attend the casting of that vote?

Is it not plain that, from every point of view, we Americans should maintain our traditional American policy of friendship for all nations and no political connection with any nation? And is not that tried and tested policy best, not for us only but for the world?

Force applied to foreign nations to make them conform to our ideas is futile—example accomplishes much more without bloodshed or coercion.

Let America be that example—an example of a happy and prosperous people made so by their self-restraint, their peaceful purposes, their institu-

tions of orderly freedom, and above all their fortunate political detachment from ancient and alien feuds.

For the good of the world, as well as for our own well-being, is it not better for us to continue to be the masters of our own destiny and an example to other nations?

II

COMMON SENSE AND THE CONSTITUTION

Crusade against the Supreme Court: the Five-to-Four Rule and Congress: the People's Law: Court and Capital: the Ideal Judiciary: Constitutional Power and the Modern Tendency.

Of course the Constitution is not sacrosanct. Nothing human is; and our Constitution is a human document, written by human beings for human beings and adopted by human beings after a great deal of discussion.

Also our Constitution is a development of our history—and a continuous and continuing development. It grows with the nation's growth and responds to its needs; it is not a mechanical straitjacket cramping the brain and imprisoning the energies of a people.

The American Constitution is not the foe and jailer of ideas and experiment, but, instead, the friend and guide of thought and conduct.

In short, our fundamental law is altogether earthly.

So let us put aside sentimental appeals to our emotions that there is something divine about it. There are plenty of practical reasons for maintaining our Constitution unimpaired; it needs no superhuman support.

I have not yet heard of any man-made thing that was perfect. But our fundamental law is better than any other yet conceived. I imagine that I could improve it; and there are a million others, each of whom is convinced that he, too, could improve it, and each of us is sure that his or her idea is the one thing needful.

If all of us were to get to work on the Constitution with our notions, might we not carve, tear, patch and otherwise mangle it until there would be nothing left?

Still if any one thinks the Constitution ought to be changed, by all means let him try to bring the public to his view. I bear him no ill will on that account. I assume that he is as sincere as I believe myself to be.

Nobody has a monopoly of candor or a corner on patriotism—nor yet on wisdom.

After all, we probably are after the same thing—the best possible government for the whole people. We differ only as to the means of accomplishing that common purpose.

As a defender of the Constitution, I do not want acrimony for an ally.

In this open-minded attitude and friendly feeling let us talk over together the movement now under way to amend our Constitution again—this time by destroying the power of our national Supreme Court to nullify unconstitutional legislation.

In the first place, it is nothing new; it has been tried many times in the past. Indeed, during our history, no less than eighteen bills, resolutions and proposed amendments to the Constitution have been offered and urged to destroy or limit the power of the Supreme Court to invalidate congressional or state legislation—and the justices were branded as "an oligarchy" who had "usurped" that tyrannical authority.

Most of these grew out of state antagonism to national powers asserted by the Supreme Court; but everybody now agrees that what the court then did was wise, necessary and right.

All these agitations against the judiciary in bygone days died out, because the sober second thought of the people approved, in the end, the very decisions which the people in their first irritation had condemned.

CONSTANT WATCHFULNESS

But the present crusade is stronger than similar efforts heretofore. The depth and power of it are indicated by the extent to which it is being discussed, the calm and serious manner of these discussions and the measured deliberation of the leaders of the movement.

When a favorite subject of debating teams in our high schools and colleges is that of judicial review of legislation; when that subject is constantly discussed, and with signal ability, in labor organizations; when our numberless economic leagues, civil forums and other similar bodies of inquiring citizens listen with increasing interest to lectures and papers on that topic; when many other like manifestations of public concern are taking place in every community, only deaf and dumb minds can be unaware of the situation.

I get a large number of letters from all parts of the country and from all kinds of people; and many of these letters speak of this very thing. The letterheads of one or two from high-school students bore these printed words: "Resolved: that the Supreme Court should not declare Acts of Congress unconstitutional."

It is idle to denounce this developing public opinion; denunciation seldom does any permanent good.

The only thing to do is to reason the matter out in plain and simple terms so that everybody can understand the question—and, above everything else, to be fair about it.

Criticism of any mundane thing is all right—perfectly natural, in fact wholesome—and courts are not exempt from that normal functioning of the alert and healthy human intellect. That is the way Abraham Lincoln looked at it.

One of the ablest and most learned—yes, and most "conservative"—justices that ever sat upon our national Supreme Bench, David Josiah Brewer, thus described the true and helpful state of mind toward the Supreme Court itself:

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism.

"The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all.

"The moving waters are full of life and health; only in the still waters is stagnation and death."

This quotation is from an uncommonly thoughtful and carefully prepared address by Justice Brewer—on what subject, do you think? On Abraham Lincoln! And the gentle reference to bad taste in some critics and criticisms was applied to those who were intemperately assailing the Supreme Court at the time Justice Brewer delivered his oration. Rather liberal minded, was it not, for a "judicial autocrat"?

Or take this brilliant statement of the same truth by Professor Felix Frankfurter, of the law faculty of Harvard University:

"A steady stream of enlightened and disinterested professional criticism must play upon the work of the Supreme Court if its transcendent function in exercising a virtual veto power over national and state action is to be saved from destructive obscurantism."

So the complaint about the judiciary and criticism of the Constitution which we hear to-day are not wicked; and merely to pour vituperation upon the critics only feeds the fires of discontent. The sole question for just minds to consider is: What is the best thing to do about it if anything at all should be done about it?

FIVE-TO-FOUR DISCUSSION

Of course the Supreme Court of the United States itself could quiet this agitation. By far the strongest

force that gives the movement life and power springs from the five-to-four pronouncements of that tribunal of which there have been more in the last half decade than in the preceding one hundred and twenty-nine years of our history.

When a decision upholding an Act of Congress carrying out a great, settled, national public policy is reversed because one justice suddenly changes his mind, the average man and woman are mystified. And yet that is what happened in the celebrated Income Tax Case.

When by a vote of five to four the Supreme Court overthrows an Act of Congress putting into effect the determination of the country—reached after years of discussion—the public mind accepts such a decision with reluctance. Yet that was done in the first Child Labor Case.

The decision of the Supreme Court overthrowing the minimum-wage law added to the general dissatisfaction with five-to-four nullifications of Acts of Congress when embodying a public policy. Though Justice Brandeis did not sit in this case, it is well known that he as ardently believes the law constitutional, as do Chief Justice Taft, and Justices Holmes and Sanford.

The shifting of judicial votes in the historic Legal Tender Cases was well-nigh grotesque. When the

first of these celebrated cases came before the court it was composed of only eight justices, because Congress had reduced the number to prevent President Andrew Johnson from filling vacancies.

Four justices thought that the Act was unconstitutional and three were positive that it was constitutional.

The eighth justice, Robert C. Grier, at first thought that the law was constitutional and thus the Court was equally divided. Justice Grier changed his mind, however; but before the decision could be rendered he resigned. Thus by a vote of four to three the Legal Tender Act was held to be unconstitutional.

While this decision was being announced President Grant appointed two new justices to fill the places on the Supreme Bench, which Congress restored the moment President Johnson's term expired. One year later, the Legal Tender Act was again considered and, since the two new justices thought that the Act was constitutional, the preceding four-to-three decision was reversed by a five-to-four vote.*

* A brief statement of these cases may interest and be helpful to the reader.

The Income Tax Case (157 U. S. 429 and 158 U. S. 601) was this: Until 1894 an income tax was generally regarded as an "emergency tax" to be levied only when vitally necessary, as in war. Such a tax had been so levied for that purpose, and when questioned, the power of Congress to impose such a tax had been sustained. In the Wilson-Gorman Tariff of 1894 an income tax was made a general

Read the majority opinions in these cases and then read the minority opinions; any lawyer can

and ordinary source of revenue. The Supreme Court rendered two decisions. In the first, by a vote of six to two (one justice then being ill and absent) the tax on income from real estate in the form provided by the law was held to be unconstitutional—upon incomes from other sources the Court was evenly divided. So a reargument was ordered and a new decision rendered. But Justice George Shiras, Jr., who at first thought the tax constitutional on other incomes than from real estate in the form provided, changed his mind; and by a five-to-four vote the entire tax was held to be unconstitutional.

The first Child Labor Case (247 U. S. 251) was this: Tens of thousands of children from five to fourteen years old were at work in mills, mines, factories and sweat shops—and still are. Such labor during these tender years wrecks them physically, morally and mentally. Also, aside from the inhumanity of this, is the economic phase—business men and manufacturers in states that forbid child labor have to compete with those in states that permit child labor.

To end this, Congress passed an Act prohibiting child-made goods from interstate commerce, as had been done with many other things. The Supreme Court, by a five-to-four vote, said that this law was unconstitutional. In the second Child Labor Case an Act of Congress to tax out of existence employers of child labor was declared unconstitutional by an eight-to-one vote—practically unanimous. The most earnest and informed friends of the oppressed children were as satisfied with this decision as they were dissatisfied with the five-to-four decision in the first Child Labor Case. Of course taxation can not be used for the express purpose of destroying a specific business.

The Minimum Wage Case (261 U. S. 525) was this: After prolonged and minute investigation of the wages of women and children in Washington City, it was found that they were not paid enough wages with which to buy food, clothing and shelter; and that from this state of things certain alleged conditions resulted. To end this in the nation's capital, Congress passed a law fixing a minimum wage for women and children in the District of Columbia. By a

tell you where to get them. You will find them interesting—very interesting indeed, especially those in the minimum wage and first child labor cases.

Cases like these, most of them recent, have been conspicuous and of dramatic character; and it is these five-to-four decisions that the opponents of the Supreme Court have seized upon and used so effectively with the average citizen.

Congress is powerless to change this practise. The bills—a notably conservative senator has publicly announced that he, too, will introduce such a measure—to require the concurrence of seven out of nine justices in order to declare an Act of Congress unconstitutional are futile.

If Congress could do that it could require a unanimous agreement of all nine justices; or it could say that a minority may so nullify an Act of Congress; or it could say that the Supreme Court should not

five-to-four vote the Supreme Court overthrew this law on the ground that it interfered with the liberty of contract.

The Legal Tender cases (8 Wall. 603 and 12 Wall. 457) involved the constitutionality of the Legal Tender Acts of Congress during the Civil War which made the Treasury notes of the Government legal tender for the payment of debts. The Constitution gives Congress the power to "coin money," and it was said that since the issuing of "greenbacks" was not the coining of money, creditors could not be forced to accept these Treasury notes in payment of debts, especially those contracted before the enactment of the law. Upon the constitutionality of the law the Supreme Court rendered decisions as stated in the text.

pass at all on the constitutionality of Acts of Congress.

Congress has no more right to make rules of procedure for the Supreme Court than that tribunal has a right to make rules of procedure for Congress. If such a bill should be passed the President would veto it; if he approved it the Supreme Court would ignore it, of course. So Congress can not modify the five-to-four practise.

But the Supreme Court itself can. For instance, it can adopt a rule for its own guidance requiring six out of the nine members of the Supreme Court to agree that an Act of Congress is unconstitutional before so deciding. If the Supreme Court would adopt such a rule and publicly announce it the movement to destroy its power over unconstitutional legislation would soon come to a standstill.

It is a matter for the justices of the Supreme Court to decide for themselves and it involves statesmanship of the first order. It is a question of policy, not power, of good sense and sound judgment rather than abstract right or wrong.

Once before, after similar assaults upon the Supreme Court, the justices made public a rule of that kind. Public complaint had been made that important state legislation had been nullified by a majority of a quorum of the Supreme Court, which

majority of a quorum was, in fact, a minority of the whole court; and the public was far more irritated by the unreasonableness and unfairness of such alleged judicial action than it was by the striking down of the unconstitutional but popular statutes.

So Chief Justice John Marshall, who was a greater statesman than he was a lawyer, publicly announced that the practise of the Court was that the Court would not, "except in cases of absolute necessity," decide cases "where constitutional questions are involved" unless by a majority of the whole Court.

This destroyed the ground for the criticism that vital constitutional decisions had been made by a minority of the Court.

So to-day the Supreme Court can destroy the ground for the criticism that vital constitutional decisions involving the settled public policy of the nation are made by a bare majority of one justice. Is this unreasonable?

It is an axiom of constitutional interpretation that the Supreme Court will not overthrow any law as unconstitutional unless that law is such an undeniable violation of the Constitution that there is no doubt about it. In a memorable opinion the late Justice John M. Harlan, then one of the most powerful members of the Supreme Bench, thus stated the rule:

"Legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of fundamental law of the Constitution."

Scores of like statements have been made by the Supreme Court itself.

A PUBLIC CONTROVERSY

But when five able and learned justices think one way, and four equally able and learned justices, all on the same bench, think the other way and express their dissent in powerful argument, sometimes with warm feeling, is it not obvious that the law in question is not such a plain infraction of the Constitution as to be unconstitutional "beyond all question"?

However, if the decisions of the Supreme Court declaring Acts of Congress to be unconstitutional were made by a majority of two-thirds of all the justices—six out of nine—instead of by a majority of one—five out of nine—the average citizen would accept it more willingly. Even those who do not like the decision itself would acquiesce with less grumbling. They would say: "Well, if six judges out of nine are sure that that law violates the Constitution I suppose they are right."

That is only human nature. It is absurd to say

that those who object to the five-to-four practise will be just as much dissatisfied with a two-thirds decision on constitutional questions. Common experience proves the contrary. One might as well say that the minority of the people accepts the close and doubtful result of an election as readily as it concurs in an overwhelming verdict at the polls.

It is said that to require more than a bare majority to declare an Act of Congress to be unconstitutional would put the party attacking the law at a disadvantage, since he would have to convince six judges that the law was unconstitutional, whereas the party upholding the law would have to convince only three judges that the law was constitutional.

But this objection would seem to be insignificant compared with the vital circumstance that a law passed by a majority of the Senate and House and approved by the President is to be stricken down or upheld.

Attack upon such a law is not merely a controversy between the two parties immediately before the Court; it is also a dispute between the plaintiff on the one hand and the legislative and executive power of the nation on the other hand.

Moreover, the defendant of record is not the only real defendant. The thousands, perhaps scores and even hundreds of thousands, of persons whose sad

condition the law was meant to relieve are also defendants in fact.

The other day a powerful corporation lawyer and ultra-conservative wrote me on this very point, that "the burden of overthrowing such a law should rest heavily on the party who attacks it." So we see that the plain common sense and sheer justice of the proposition appeal to the "attorney of the interests" quite as much as to the "tribune of the people."

In short, an effort to overthrow an Act of Congress is not a private case exclusively; it is also a public case. Indeed, the public interest involved in anything whatever could hardly be greater than in such a controversy.

To say that more than a majority of one justice means decision by a minority is, perhaps, as inaccurate as the other extreme assertion that such a majority means that a single man nullifies an Act of Congress. Of course neither of these statements is wholly true.

The fact that an Act of Congress is involved modifies the first, and the fact that some power must decide modifies the second. The whole matter is one, not of rigid logic which seldom composes any deep human complication, but of reasonable expediency by which most large affairs of this life must be handled.

The other familiar argument in favor of the five-to-four rule is that ours is a government by majorities, and that to change this as to the Supreme Court would be violative of a fundamental principle of our institutions.

Is not this unconvincing in view of the fact that impeachment of national officials must be sustained by two-thirds of the Senate? Or that in jury trials verdicts can be reached only by unanimous vote? Or that two-thirds of Congress are necessary to pass a bill over the veto of the President? Or that treaties can be ratified only by two-thirds of the Senate?

So we see that the majority principle does not "permeate" our institutions after all.

The "majority principle!" In overthrowing an Act of Congress by a five-to-four vote in the Supreme Court, the majority of the Senate, the majority of the House and the judgment of the President are all nullified. Not only that, but the majority opinion of the country is also overthrown, since the law thus invalidated presumably expresses the will of the majority of the people.

When so distinguished a lawyer and determined conservative as Frederic R. Coudert, of New York, asserts, as he does in a meticulously careful book, that "few if any industrial-reform measures need have been construed as contrary to the Constitu-

tion," is it not plain that objection to the five-to-four decisions in such cases is not confined to impatient "radicals"?

If something is not done about it, is it not probable that the movement to take away altogether this power of the Supreme Court to invalidate Acts of Congress will continue to gather strength?

This rule of procedure—that the Court will not declare an Act of Congress to be unconstitutional unless six of the nine justices concur—would not, of course, apply to the acts of state legislatures, since a different principle governs the consideration of such legislation, the principle of the relation of state to nation. Mr. Justice Holmes in one of his legal essays points out this basic difference between the power of the Supreme Court over Acts of Congress and that over state legislation.

What now about the movement itself? What are the merits of the proposal so to amend our national Constitution as to withdraw from the Supreme Court its duty to invalidate unconstitutional Acts of Congress?

A great deal has been written on both sides of this basic question; but though learned and able, these writings have been perhaps too technical and involved to interest the average man and woman. This is especially true of those who have defended

the Court. So let us try to examine this elemental question in popular language.

THE PEOPLE'S LAW

What is the Constitution? It is the people's fundamental law, written for the people, operating directly on the people and adopted by the people themselves.

The historic convention at Philadelphia that framed our Constitution may be likened to a committee to work out a plan of government for the people, to be submitted to the people. The deliberations of that committee were secret, because it was then touch and go whether or not a national government could be established at all.

But when the Constitution was written it was given the utmost publicity; and the people themselves at the polls elected delegates to conventions in each state for the express and exclusive purpose of discussing the Constitution, and, after such discussion, ratifying or rejecting it.

So we see that our national Constitution is the people's law— their basic, fundamental, permanent law. By that basic, fundamental, permanent people's law our present Government was created, and by that basic, fundamental, permanent people's law, and by it alone, our Government now exists.

It assigns to each governmental department its field of action and usefulness, puts specific limitations on state powers, and guarantees elemental rights to be enjoyed forever by the people, and by each one of them.

Among other duties which this people's basic, fundamental and permanent law requires the judiciary to perform is to interpret that Constitution; and also to interpret statutes passed by the people's temporary representatives in pursuance to the Constitution—that is, only such laws as the Constitution permits.

Suppose the people's temporary Congress enacts a statute which the people's permanent law forbids Congress from passing; and suppose a citizen, in order to protect himself, takes the question to the court and finally to the Supreme Court. What are the courts to do?

If they uphold the statute they strike down the the Constitution. That is, if the court recognizes the Act of the people's temporary representatives, the court must ignore the people's permanent law.

On the other hand, if the court upholds the people's permanent law, then the court must of necessity strike down the unconstitutional Act of the people's temporary representatives.

Of course if Congress or state legislatures may pass

any laws they please, regardless of the Constitution, that charter of our rights and security disappears—we have no Constitution.

PROTECTION OF CITIZENS

Take specific examples. The only crime defined in the Constitution is treason; and the Constitution says just how it shall be proved. The accused person can not be convicted except "on the testimony of two witnesses to the same overt act, or on confession in open court." Moreover, the Constitution limits the punishment for treason.

There were dramatic as well as profound reasons for this vital provision. In all other countries at that time—and even now—what is called the law of constructive treason existed, and yet exists, by which persons could be, were, and still are convicted of treason upon circumstantial testimony, sometimes of the flimsiest nature.

Under this law innocent men and women had been put to death after the most horrible torture.

Suppose that, in a time of public frenzy—and it is only at such times that people are accused of treason—Congress should pass an Act declaring treason to be something entirely different from the crime described in the Constitution—it was proposed in the

Constitutional Convention to give Congress the power to do that very thing—or that treason may be proved by the testimony of one witness or by circumstantial evidence.

Suppose that a citizen should then be indicted, tried and convicted—and appealed to the Supreme Court for protection. What ought the Supreme Court to do? What must the Supreme Court do?

Should not, and must not the Supreme Court obey the Constitution? If so, must not the Supreme Court say that the citizen shall not be put to death or imprisoned for life under an Act of Congress that is in violation of the people's Constitution?

In interpreting this very provision of the people's basic, fundamental and permanent law, Chief Justice John Marshall forever overthrew the brutal and unreasonable European doctrine of constructive treason, and forever established in the United States the humane and reasonable American doctrine of personal and actual treason.

Cautious writers on the subject have estimated that Marshall's judicial opinions on treason have saved many thousands of lives of innocent men and women, which otherwise would have been sacrificed to popular passion. During the Civil War, for instance, the number who would thus have been made the victims of abnormal suspicion, groundless

rumor and even personal spite would have been very large.

Similar examples of constitutional guaranties of personal and property rights to be safeguarded by the courts against assaults from any quarter will appear to anybody who will take the trouble to read the Constitution. For instance, security from being twice put in jeopardy for the same offense, the prohibition of export taxation, the privilege of peaceable assembly and petition, the sanctity of free speech and press, the security from unreasonable search and seizure without warrant, the right of religious liberty, the stability of contract, the inviolability of property —all these and many other guaranties could be destroyed if Congress could disregard them at will. Many times Congress has tried to ignore several of them, and the Supreme Court has saved them.

That tribunal has often rescued citizens from unreasonable search and seizure without warrant; and has even denied the executive department of the National Government the right to use as evidence papers seized in violation of constitutional guaranties.

Time and again the Supreme Court has protected citizens from ex post facto laws. It has prevented citizens from being tried twice for the same offense.

DECISIONS OFFENSIVE TO CAPITAL

Those who attack the Supreme Court assert that it has been hard on labor, and some five-to-four decisions sustain the charge; but the Supreme Court has been far harder on capital. Witness the many great antitrust pronouncements, such as the dissolution of the Northern Securities Company, or the numerous decisions upholding the Interstate Commerce Act.

Witness the long line of cases in which the police power of states has been sustained, even when extensive property rights and vast business interests have been seriously injured; such, for example, as the famous Granger Cases and the Slaughterhouse Case. Witness, especially, the recent decision in the Wyoming Carbon Case.*

* Again a brief explanation of these cases may aid those readers who are not lawyers.

The Granger Cases (94 U. S. 113) were: When Chicago had become the great grain-distributing center of the country enormous elevators were erected in which the grains of various owners were received and mixed and for which charges were made by the elevators as they saw fit. Serious evils to the farmer resulted, to end which a provision of the state constitution supplemented by state statutes provided, among other things, fixed charges for elevator service. The Supreme Court upheld this law as a rightful exercise of the state's police power.

The Slaughterhouse Case (16 Wall. 36) was this: To safeguard the public health the Louisiana Legislature passed a law incorporating an abattoir company and requiring it to build a great plant at which all slaughtering by everybody must be done in New Orleans and surrounding territory. For this service the company was

In each of these cases tremendous investments were seriously affected, and capital earnestly protested. Indeed, the dissatisfaction with the decision in the Granger Cases was exceedingly sharp, and is still manifested.

These are only three examples of a very large number of cases where the Supreme Court has upheld acts of state legislatures which greatly and adversely affected capital. The truth is that for every decision of the Supreme Court of which labor makes complaint there are many more decisions of the Supreme Court offensive to capital.

The Supreme Court has even approved the delegation by Congress to administrative boards of judicial, legislative and executive powers over the weightiest matters affecting capital; as, for example, the Interstate Commerce Commission and the

authorized to make a fixed charge. The Supreme Court upheld the law as a proper exercise of the state police power.

The Wyoming Carbon Case (254 U. S. 300) was this: That state has a limited supply of natural gas. A large plant was erected which used some of this gas to make carbon black, from which ink is manufactured. This process seriously depleted the state's supply of natural gas. To end this the legislature passed a law forbidding the manufacture of carbon black from natural gas. The Supreme Court upheld this law as a correct exercise of police power.

The police power is that of safeguarding the health, morals and well-being of the community. It is preëminently the social power. Only the states have this police power, except as to the District of Columbia and territory belonging to the United States over which Congress exercises police power.

Federal Trade Commission. Moreover, the Supreme Court, in a very recent litigation, the Tenement House Case, actually upheld a law which overthrew certain contracts because they were against the public interest.

The Supreme Court of the United States has been far more liberal than state supreme courts. For instance, the appellate judiciary of a certain state in less than fifty years has stricken down more than one hundred and fifty legislative acts and municipal ordinances, whereas the Supreme Court of the United States has invalidated less than one-third that number of Acts of Congress during a period nearly three times as long. The same is true, in varying degrees, of many other states.

Also, when state laws have been attacked the Supreme Court of the United States has sustained over ten times more such statutes than it has disapproved. Though the appeals to that tribunal to overthrow state legislation, because property rights have been taken without "due process of law" or vested interests have been denied "the equal protection of the laws," have been excessively numerous, few of these appeals have been successful.

The truth is that the public is never told of Supreme Court decisions repelling attacks upon state and national legislation; whereas the public always

is clamorously informed of exceptional rulings nullifying laws, most of which decisions were plainly right, only a few being doubtful, and none wrong beyond question—the very fact that they were made by a majority of the Supreme Court proves that many able and honorable persons think them to have been right. Let us not be dogmatic.

A PROGRESSIVE SCIENCE

That the American Constitution is vital and grows with fundamental and permanent social and industrial changes is due to judicial statesmanship. Take these two, out of well-nigh countless official statements of the kind, by the Supreme Court itself:

"The law is a progressive science. Methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; while certain classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection."

Or this:

"To hold that 'precedent' is essential to due process of law would be to deny every quality of law but its age and to render it impossible of progress

and improvements. It would stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

These quotations from majority opinions of the Supreme Court express the spirit in which that tribunal usually considers the philosophy of law-making and constitutional development. As Mr. Coudert points out, the Constitution is constantly changing through judicial interpretation in accordance with fundamental changes in industrial and social life.

So it comes about, as stated by Professor Charles Grove Haines, whom nobody will call a "reactionary," that "the Supreme Court of the United States has, with very few exceptions, sustained radical labor laws"; and that "the future of social and industrial legislation is encouraging."

Why then should anybody want to take from the Supreme Court this beneficent power and this vital duty?

An argument vigorously advanced by those who seek to destroy judicial review of legislation is that senators and representatives in Congress also make oath that they will support the Constitution; and that they, as well as the justices of the Supreme Court, can be depended upon to observe the nation's fundamental law. This may be true in theory, but

all of us know—and history proves it—that it is not true in practise.

Generally speaking, our state and national legislators try to conform to what they think is the immediate—the present—desire of a majority of their constituents. This is not only natural; perhaps it is right, since it carries out the idea of popular representative government and gives expression to changing public opinion. But this transient public sentiment which our legislators reflect may be, and sometimes is, contrary to the settled determination of the people as fixed in the people's basic and permanent law, the Constitution.

Moreover, is it not possible that many members of legislative bodies are not intimately familiar with the Constitution, and the historic and vital reasons for every provision in it? Some have even questioned, perhaps unjustly, whether all our senators and representatives have read the Constitution from beginning to end—much less made a study of it.

If this is so is it not obvious that lawmakers thus unequipped with necessary knowledge will, with the best possible intentions, try to get laws enacted without thinking whether those laws are forbidden by the Constitution?

It has been charged that the tendency to elect such well-meaning but uninformed legislators has

been growing for a long time. Whether this is true, it is certain that for some years past the practise has prevailed among our lawmakers, state and national, to pass on to the courts the responsibility for unconstitutional legislation.

So the saying has grown up among our legislators: "Oh, let the Supreme Court settle the constitutionality of this law; that is its business, not ours."

As the late Frederick N. Judson observes in his scholarly lectures: "The enormous volume of legislation has been marked by a progressive deterioration of that legislation," accompanied by "a growing disposition to disregard the constitutionality in legislation on the ground that such matters can be ' straightened out ' by the courts."

Possibly this may explain to some extent the increase of Acts of Congress which the Supreme Court has been compelled to declare unconstitutional.

Just here comes in the most important point of all in practical effect—and the most interesting point of all: The kind of men appointed to the Supreme Court determines the public confidence in that tribunal; and the continuance of its powers rests upon the regard of the people, and upon that alone.

SUPREME COURT TIMBER

Destroy popular faith in the Supreme Court and its powers will soon be taken from it. Yet those powers constitute the keystone to our whole system; if they are withdrawn everything falls, and we shall have to build anew.

So the character of members of the Supreme Court is vital to the permanence of American institutions—not their moral character alone, of course, but also their intellectual stature, their vision, their outlook on life, their knowledge of history, their familiarity with present conditions and developing tendencies, their sympathetic understanding of human nature and its reactions.

One of the weightiest and most far-reaching constitutional duties of a President of the United States is that of selecting federal judges, and especially justices of the Supreme Court. To place a man upon the bench solely because of friendship or personal obligation or to appoint a judge for reasons of partisan politics or thus to elevate the leader of a political faction is not only dangerous but morally culpable and well-nigh unpatriotic. Such appointments, even of good lawyers and conscientious men, impair public confidence in the judiciary.

What sort of men should be made judges of any

court, but above all, justices of the Supreme Court of the United States? This is a vital public matter; indeed, no other equals it.

To be sure, a judicial appointee must be a good lawyer—the best to be found. But he must be much more—he must also be a publicist of the first order. He must have the qualities of statesmanship. Indeed it is as important that a Chief Justice of the United States shall be a statesman as that he shall be a lawyer—even more important—since he must interpret laws affecting profound national policies as well as pass upon questions raised on the record of mere lawsuits. And this is true also, of course, of every justice of that court.

He must understand the philosophy of the law—that principles must be adjusted to developing society. For instance, the right to private property is a principle. But not all kinds of property are alike. Railroads, tramways and public utilities are private property, but very different from other private property. Even automobiles are not the same kind of private property that household furniture is.

In former times walking on hot plowshares was "due process of law." As used in our Constitution, "due process of law" can not now be precisely defined so as to fit perfectly every possible concrete circumstance, but must be applied to the particular

facts of each case. A large number of decisions of our Supreme Court, with exceptions as infrequent as they are regrettable, would seem to indicate that "due process of law" covers "wanton" and "arbitrary" interference with liberty or "spoliation" of property.

Yet it is this guaranty of "due process" in the Fifth and Fourteenth Amendments to our national Constitution by which our Supreme Court is now most frequently required to measure legislation. Obviously that phrase does not mean the same thing to-day that it meant when first formulated centuries ago.

The epigram of Justice Holmes has already become famous: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."

We see, then, how inappropriate—indeed how meaningless and hurtful—would be out-of-date definitions of "due process of law" applied to a state of things to which those definitions had no reference whatever. And this obvious truth holds good as to other vital features of the Constitution.

For instance, even ultra-conservative writers have pointed out that modern industrialism has destroyed the equality of employer and employee and that the ancient individualistic conception of contract "evolved before the rise of corporations as the main

factors in the business world is not always justly applicable to present conditions."

A judge must realize all this. He is no more fitted to be a judge merely because he is a lawyer exclusively, than a man is fitted to be Secretary of the Treasury merely because he is a banker exclusively. I repeat that he must be the ablest of lawyers, but also he must be even more of a statesman.

He must have the contemporary mind; it must not be pickled in precedents. He must use precedents instead of being used by them.

In short, he must have such qualities as will strengthen public confidence in the courts, and not such qualities as will weaken public confidence in the courts. In his thoughtful and comprehensive study of the judiciary, Prof. George Gorham Groat well describes the supreme task of the judiciary:

"The largest work that a court can do, and it is a work that must be done by some one, is to keep a constitution up to date."

Here is the true judicial attitude as stated by one of the ablest of living jurists, as much admired abroad as at home, Mr. Justice Oliver Wendell Holmes, of the Supreme Court of the United States, whose intellect is as vigilant and strong on the bench at the present time as his conduct was gallant and glorious on the field of battle in the Civil War. In

delivering a unanimous opinion of the Supreme Court of Massachusetts, when he was chief justice of that eminent tribunal, Justice Holmes said of himself and his associate justices:

"We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practise of the past."

A judiciary made up of the kind of men I have tried to describe causes the average citizen to feel that the courts are far better equipped to decide the validity of legislation than are representatives and senators, even though sworn to support our fundamental law and, in theory, supposed to understand the Constitution.

In addition to these plain and conspicuous practical reasons that Congress is not so competent to determine the constitutionality of laws as is the Supreme Court of the United States is the fact that the people's fundamental law gives that Court the exclu-

sive power and makes it the particular duty of that Court to be the final arbiter in conflicts between mere temporary legislation and the people's permanent Constitution.

Indeed, it is not too much to say that this power of judicial review is the most important function of the nation's highest tribunal. As John Fiske says:

"It is absolutely indispensable" that the courts should be given this power. So vital is this fact that those who would take this authority away from the Supreme Court see in that fact the first formidable obstacle to the accomplishment of their purpose.

CONSTITUTIONAL POWER OF COURTS

Therefore they deny that the Constitution gives the Supreme Court any such power. They assert that the Supreme Court "usurped" that authority: that in the convention which framed the Constitution the proposal was made several times to give the Supreme Court this very power; and that, after extended debate, the Convention rejected that proposal every time it was made.

If this is true it is of capital importance. So let us go into the facts as carefully and thoroughly as is possible in this necessarily brief sketch.

What really happened? The question of giving the Supreme Court the power to declare Acts of Congress unconstitutional was never presented to the Constitutional Convention; no resolution of the kind was offered in that historic body. What was proposed was that the Constitution should provide for a "Council of Revision," to consist of the President and a number of justices, to examine and pass upon laws before they went into effect; and to negative those laws if this "Council of Revision" considered them unwise, impolitic, injurious to the public interest—or for any reason whatever.

It was upon the question of adopting this "Council of Revision" that all the debate occurred in the Constitutional Convention which so much as touched upon the power of the Supreme Court to declare Acts of Congress unconstitutional. On this particular point the debates were brief and scanty; in fact they can scarcely be called debates at all.

Some of the more weighty members of the convention gave as their reason for opposing this "Council of Revision" that it was unnecessary, because the Supreme Court would, of course, invalidate any Act of Congress which violated the Constitution. Others opposed this "Council of Revision" upon the ground that to adopt it would give the courts too much power, because in any event it would be their

duty to nullify unconstitutional Acts of Congress; and if they were also given the additional power as members of the "Council of Revision" the Supreme Court would have a double negative on legislation.

One or two delegates—who, by the way, were not among the ablest members of the Convention—said that they did not think the courts should have the right to pass upon Acts of Congress. Only one man of importance, Benjamin Franklin, seemed to take this view; but he made the statement only once, and then quite casually.

The fact is that the Convention thoroughly understood that the Supreme Court would have the power to nullify unconstitutional Acts of Congress—thoroughly understood that such power is inherent in the Supreme Court and in the Constitution which created it. If this had not been so it is certain that every one of the many able and learned lawyers who were members of that Convention would have formally proposed to give the Supreme Court this very power in express terms.

Years before the Constitution was framed and adopted the supreme courts of some of the states had stricken down state laws because those laws violated state constitutions; and generally speaking, these judicial actions of the state courts were well

known to the members of the Convention that framed our national Constitution.

All historical scholars who have written on the subject agree that it was the consensus of opinion in the Constitutional Convention that the Supreme Court would have this power as a matter of course. Even historical scholars of decidedly liberal, not to say radical, views state this to have been the fact.

For instance, that accomplished scholar, Prof. Charles A. Beard, who is an eminent example of the so-called "radical" type of American historical scholarship, states that "it can not be assumed that the Convention was not aware that the judicial power might be held to embrace a very considerable control over legislation and that there was a high degree of probability (to say the least) that such control would be exercised in the ordinary course of events."

And Professor Beard thus gently rebukes those who assert that if the Convention had meant to give the Supreme Court power to annul Acts of Congress the Convention would have said so in express terms:

"To say that the Convention must have passed definitively upon every inference that can logically be drawn from the language of the instrument that it adopted would, of course, be absurd."

When the Convention had framed the Constitu-

tion it became the sole topic of discussion among the people until it was finally ratified by popular conventions. The debates in these conventions were public, and, to this day, have not been surpassed and seldom equaled in this or any other country. During these debates this very question was occasionally referred to; and every time it was said that, of course, the courts would necessarily have power to set aside constitutional legislation.

For example: The debate in the Constitutional Convention of Virginia was far and away the ablest and most extended discussion of the Constitution that ever took place. Patrick Henry there led the assault on the Constitution. Of the numerous reasons he gave against ratifying it, a minor reason was that, whereas the Virginia courts had bravely struck down unconstitutional state statutes, the national judiciary might not do the same thing with unconstitutional Acts of Congress.

John Marshall, also a member of the Virginia Constitutional Convention—no one then ever imagined that years afterward he would be Chief Justice of the United States—made the two principal arguments on the judiciary; and, in answer to Henry, declared that, of course, the national courts would declare null and void any Act of Congress that violated the Constitution. This same statement was

made several times in other state constitutional conventions; and nobody asserted the contrary.

Another fact more conclusive if possible: a series of papers written by Hamilton, Madison and Jay, in explanation of the Constitution, was printed and circulated as widely as possible. Every man in all the state constitutional conventions knew about these papers—*The Federalist* as they are now called; and many members of all the state conventions had studied them thoroughly.

Concerning the judiciary *The Federalist* carefully and clearly explained that of necessity the courts would have the power to invalidate any Act of Congress that violated the fundamental law.

So we see that when the Constitution was ratified by the people of the several states, nothing in that instrument was or could have been more perfectly understood than this very power of judicial supervision of legislation. Indeed, so generally accepted was the existence of this principle in the Constitution that there was less debate upon it in the state conventions than upon any other phase of the proposed plan for national government.

For fourteen years after the Constitution was adopted the Supreme Court had no occasion, except incidentally, to assert its power to overthrow unconstitutional legislation. But several times justices of

the Supreme Court, when sitting as circuit judges, positively declared that the courts had, and of necessity must have, this power of judicial review; and during that time none of these statements was denied or even criticized.

I have taken all this space to review the history of this matter because those who now attack the courts and the Constitution assert so vigorously, continuously and dogmatically, that the Constitution does not give the courts the power to declare legislation unconstitutional, and that the courts have simply "usurped" this power.

"USURPATION"

We are told that this "usurpation" began with the famous opinion of Chief Justice John Marshall in the celebrated case of Marbury vs. Madison. With the historical and historic facts above summarized in mind, let us see just what that case was, how it arose, and why the Supreme Court decided it as it did.

Every great human event has its origin in history, and we can not begin to understand any momentous public question without knowing the historical sources from which it sprang.

The French Revolution, which began immediately after our Constitution was adopted, created exactly

the same reaction then that the Russian Revolution has created now. The doctrines of the French Revolution, which were, at first, practically the same as the doctrines of the Russian Revolution, were advocated everywhere in America.

As a result the conservative Americans of that time grew very much alarmed. While the spell was on them the party then in control of the Government passed the first law ever enacted by Congress to suppress verbal attacks upon and even criticisms of the Government or public officials; and also to give the President power to deport undesirable aliens.

These statutes were the famous Alien and Sedition Laws of 1798. They were bitterly resented by the great majority of the American people, who believed that these offensive laws were an attempt to suppress free speech and to give the President autocratic power, which, indeed, was true.

Thereupon Thomas Jefferson, one of the cleverest politicians, in the large sense of that word, the world has ever seen, instantly seized upon these Alien and Sedition Laws as a club with which to attack the party then in power that had passed it. Jefferson was then the leader of the minority party, which was the radical party of that time, and he wished to overthrow the party in power, which was the conservative party of that time.

So Jefferson wrote certain resolutions, which he had a lieutenant introduce into the Legislature of Kentucky and which were promptly passed by that body; and he also had James Madison write and introduce similar resolutions into the Legislature of Virginia, which that body also promptly passed. These are the celebrated Kentucky and Virginia Resolutions.

Speaking by and large, these resolutions declared that the Constitution was merely a compact among the various states, establishing a general government; and that when the general government violated that compact by enacting a law not authorized by the Constitution, it was the right and the duty of any state to refuse to obey that unconstitutional Act of Congress. Thus, more than sixty years before the Civil War, the philosophy of secession was formulated and announced.

Kentucky and Virginia then sent these resolutions to the other states, asking each for a reply. Only a few states refused; those that did answer, denied the Kentucky and Virginia doctrine and asserted that the power to pass upon the constitutionality of Acts of Congress was exclusively in the judiciary and finally in the Supreme Court of the United States.

Thus the issue was framed: Where does the

American Constitution lodge the authority to declare, with finality, what is and what is not law? One side said that this power was in the states; and some went so far as to say that it was for the citizen himself to decide. The other side said that this august authority was in the judiciary and, definitively, in the Supreme Court of the United States.

This was one of the principal issues of the presidential campaign of 1800. The question was discussed in every newspaper and debated upon the stump throughout that political contest. Largely because of the people's hostility to the Alien and Sedition Laws, and especially because of the tyrannical manner in which federal judges enforced those laws, the radical party of that time elected a big majority in both House and Senate; and Thomas Jefferson was made President.

Immediately after this new radical Congress convened a motion was made to repeal a law passed by the conservative party just before it went out of power. This led to one of the greatest debates in all parliamentary annals, the historic judiciary debate of 1802.

During this debate, which lasted day in and day out without interruption for an entire session of Congress, every argument was made that has since been advanced for and against the power of the

courts to declare Acts of Congress unconstitutional. But there was no manner in which Congress could set that question at rest definitively.

Such was the situation when the Supreme Court of the United States was called upon to decide the case of Marbury vs. Madison. The facts in that case were: The last official act of President Adams was the appointment of forty-two justices of the peace for the District of Columbia. The commissions of the appointees were properly executed, but they had not been delivered when, a few hours afterward, Jefferson became President.

He directed that certain of these commissions should not be delivered. Four of the appointees thus deprived of their commissions brought suit in the Supreme Court of the United States to compel James Madison, Secretary of State, to deliver them. One of these men was named William Marbury. So the title of the case was Marbury vs. Madison.

The Supreme Court unanimously decided that it had no power to issue this order, because the Act of Congress authorizing the Supreme Court to do so was unconstitutional; that that statute gave the Supreme Court a power which the Constitution said that tribunal should not have. So the justices said it was null and void.

That is all there is to the case of Marbury vs.

Madison—all there is to the assertion that the Supreme Court "usurped" a power that does not belong to it. Even Jefferson, the leader of the opposition to judicial review of Acts of Congress, made no complaint of this "usurpation" of that power of the Supreme Court for a long time after the decision in Marbury vs. Madison had been rendered.

THE MODERN TENDENCY

Little or nothing was said of "usurpation" by a "judicial oligarchy" until Marshall, many years later, handed down those tables of American constitutional law which have made us a nation and given to Marshall his undying fame—such, for example, as those in McCulloch vs. Maryland, and Cohens vs. Virginia. The objection to those opinions was that they destroyed "states' rights."

The final argument for taking from our Supreme Court its power over legislation is that in no other country do courts have this authority. But this is not so of Canada. It is not so of Australia. It is not so of Czecho-Slovakia. The tendency of the modern world is to adopt this American idea. Even in England the more advanced thinkers regret that their highest tribunal does not have this very power.

It can not be said that democracy has yet had its

ultimate test in that country with its unwritten constitution. Macaulay and many subsequent writers have pointed out that heretofore, in England, property, liberty and the rights of minorities have been safeguarded because of the restraint, foresight and moderation of her traditional statesmen. But, as everybody knows, the influence of these men, though still dominant in foreign affairs, is rapidly passing and will soon be extinct in domestic legislation.

When it is and when the will or whim or caprice of the temporary majority is instantly registered by Parliament in a law which courts can not touch, we shall see what happens to private property, individual liberty and rights of minorities in England.

In former times the more eminent men who denied the authority of the Supreme Court to overthrow unconstitutional legislation afterward changed their minds. Chief Justice John B. Gibson, of the Supreme Court of Pennsylvania, is a conspicuous example. In a celebrated opinion he made a powerful argument—perhaps the strongest every made on that side—against the authority of courts to annul legislation. Twenty years afterward he declared that he had "changed that opinion . . . from my own experience of the necessity of the case."

Lincoln himself, criticizing the Dred Scott decision

of the Supreme Court, said that he "bowed to it," but that he would do all he could to get it reversed.

With these examples in mind, is it too much for us to expect that the able and patriotic men who just now want to denature the Supreme Court of the United States will after some years of further experience and observation also change their minds as did the great men of former times?

May we not reasonably hope that they, too, will finally come to stand for all American institutions of which the master stone is an independent judiciary with power to maintain the people's basic, fundamental, permanent law when violated by some ill-considered Act of their temporary legislative representatives?

III

STEADY AS SHE GOES

The Railroads: Their Evolution and Expansion: Financial Corruption and the Public-Be-Damned: Debts, Difficulties and Plans for Relief: Government Ownership, Regulation and Control: Foreign Experiments: the Interstate Commerce Commission: Labor Coöperation and the Spirit of the Times.

STEADY as she goes—that is the word of progress and wisdom in our handling of our railway problem. On the horizon are signs of fair weather. At last it begins to look as though we may, perhaps, be starting to make headway out of troubled waters.

We have entered a new phase in the evolution of American railways. We must go forward with it. The old methods do not fit present conditions, the old language and labels are out of date—mere patter of a bygone day, like the mumblings of some ancient about the wrongs or glories of the past.

This is 1924, not 1890 or 1900, nor yet 1910. We have advanced, are advancing, always will advance. When we stop we die. All this is true of

our railway development, which is interwoven with our national growth, and upon which our individual and collective well-being depends more than upon any other single agency of progress.

Since, in the end, public opinion must settle the railway and every other question, let us, in a friendly and intelligent manner, talk over the outstanding and simpler elements of steam transportation. In considering the matter our state of mind is vitally important. If we take up a question with a fixed idea in our heads we might as well not take it up at all. So let us be fair-minded, intent only on truth and sound judgment, hopeful of finding wise solutions and determined to find them.

Mere bandying of outworn catchwords, mere shouting of now meaningless slogans, mere quarreling over extinct conditions, mere denunciation of obsolete practises, mere abuse of men long since in their graves—all that sort of thing does not get us anywhere, but, instead, keeps us in the jungle of mutual suspicion, hatred, ill-being and reaction.

So with eyes to the front and wholesome feeling of cordial coöperation in promoting the common good, let us consider what is the best course for us to take, the most promising policy for us to adopt in the matter of railway transportation.

MARVELOUS EXPANSION

All of us will agree that railway transportation has been a matter of development, evolution, growth, progress. The railways were not suddenly created and placed where they are. Our present vast carrying system, though built swiftly, was built by degrees; and nearly all of it was constructed and reconstructed over and over and over again.

When Lincoln became President there were only 30,635 miles of railway in the entire United States, on the thin rails of which ran fewer than 100,000 light freight and passenger cars, drawn by 1000 or so feeble locomotives, the whole operated and maintained by about 150,000 men earning approximately $90,000,000 a year.

To-day there are, all told, in the neighborhood of 260,000 miles of main track, about 120,000 miles of side, passing and terminal track, more than 65,000 powerful locomotives, nearly 2,500,000 heavy freight and passenger cars, the newer ones of solid steel; and this system, nation-wide in extent, requires for its maintenance and operation not far from 2,000,000 employees earning approximately $3,000,000,000 every year.

One of the little locomotives that took Lincoln from Springfield to Washington in 1861 could not

even move a loaded freight train of to-day, could not so much as jar it; and could not pull ten fully loaded cars even five miles an hour.

More freight is now hauled, more passengers now carried in a single week than were transported in an entire year by the embryo railways of the 'sixties.

These facts make plain the marvelous expansion of American railways and of the American people, too; yet they give but a faint idea of the innumerable, complicated and delicate phases of American railway transportation at present as contrasted with the few and simple elements of that subject when the Civil War broke out.

Luckily for us we do not have to confuse our minds with these perplexing details, gravely important as all of them are; that is work for our lawmakers. All that citizens need understand is the fundamentals of any problem in order to form a sound opinion about it and determine upon a sensible general policy.

If busy people were required to go into the intricacies of almost any economic division of our amazingly complicated modern life, democracy would break down, because ordinary men and women, absorbed in their day's work, simply can not do it; they have no time to do it. But the average person can easily comprehend the big plain outlines of any subject

whatever; and in this basic fact are our safety and salvation.

BAD PRACTISES OF THE PAST

There have been two distinct and clearly marked periods in American railway development, and we have now entered upon the third stage of this evolution. Each of these phases of progress was natural, inevitable and, in that sense, necessary; but in each of them evils grew up, as appears to be the way with human affairs.

Roughly speaking, the first era of railway development may be called the period of construction. It lasted more than a generation after the end of the Civil War. The supreme need of the country was quick and cheap transportation; and the building of railways was the passionate desire and demand of the people.

Encouragement was the spirit of the times. So came decades of railway building such as the world never had seen and never can see again. Thus appeared the miracle of the peopling of a continent and the consolidation of a nation within the span of a single human lifetime.

But during these wonderful years of railway expansion, and especially in the latter part of them, certain methods were employed that the people began to

question—excessive stock-watering, prodigious bond issues, daring capitalization of future possibilities, duplication of profits by the device of construction companies, rate wars, rebates, discriminations.

These are of only academic interest to us to-day, since nothing of the kind is possible now without the violation of criminal statutes; and mention is made of them merely to indicate the sources of the second period of American railway development.

Many students of the subject now believe that some of the things considered reprehensible to-day were useful and necessary during the period of construction. For instance, very great inducements were required to get men to put their money into railways at that time, particularly through unsettled or thinly populated regions the productivity of which was problematical at best. The risk was prodigious, the reward doubtful. It was all a matter of vision and of faith.

Our entire West from Iowa to the Pacific States was then believed by most to be fit for nothing but grazing. Only a rare seer, who usually was laughed at, foretold the population and productiveness of the Mississippi Valley itself —and generally even these prophets fell far short of the mark that we in our day have seen reached.

So men had to be given a great deal to get them to

invest their cash in an enterprise so grandiose and uncertain as railway building then was. That fact was the cause of watered stock and overbonding; purchasers simply would not buy bonds except at a discount plus a heavy stock bonus.

It was the same with construction companies and the like. In short, builders, promoters and investors —everybody, in fact—wanted to get all the profit in sight and out of sight.

Were they not taking the hazard? Were they not developing the country? In such fashion they reasoned and acted. And so the railways were laid down during the first part of the construction period of American railway development. And it is only just to admit frankly that the roads could not possibly have been built at that time had present-day legal restrictions then been in force and governmental interference then been practised.

GOVERNMENT REGULATION

Yet the greed, the insolence, the arrogance, the contempt of public feeling, the scornful disregard for the rights of the people shown by railway builders, managers and promoters changed the general good will into antagonism. "The public be damned," a Vanderbilt was reported as saying, thus voicing the sentiment of the kings of transportation.

Sometimes wholesale scoundrelism was perpetrated. In such fashion the suspicion and even hatred of the community were set blazing—and political vote hunters fanned the flames.

Then the final stupidity and wickedness: The railways went into politics! No doubt they did this in self-defense at first, but soon they corruptly manipulated political parties for immunity and power—a thing as shortsighted and foolish as it was undemocratic and inherently venal.

So came about the second stage of American railway evolution, which, speaking by and large, may be termed the period of railway regulation. Repressive and restrictive railway laws appeared on the statute books all over the country. Most of these curbed power, restrained abuses, prevented misdeeds; many of them were merely vindictive rather than remedial; some were stupid although well intended; and few if any were written by honest and capable railway men with first-hand and comprehensive knowledge of the subject.

However, every one of these directive and punitive laws interfered with railway management and operation in one way or another; and a ramshackle, disconnected state and national government machinery was thrown together to make the railways conform to a vague but determined public notion of

just dealing. It was hard on the railroads, but they had brought it on themselves.

All things considered, the results were, on the whole, advantageous to the country in the long run; for out of this maze of hostile railway laws the broad and beneficent policy of public supervision of the nation's transportation has become a living part of America's institutions of orderly freedom.

So we see that this second phase of our railway evolution was as natural and necessary as was the first phase—that this second phase grew out of the first, was produced by it indeed. And in both there was far more of good than there was of evil.

In like manner we have entered upon the third period of the development of American railway transportation. It, too, is a natural and necessary advance; it, too, was caused by the intemperance and excesses of the second period, just as that, in turn, was the product of the evils of the first. And this present stage in the growth of our railway system will be more inspiring and fruitful of good for all the people than either of those that went before.

It will be known in history as the period of coöperation—the period of American railway systemization and establishment.

What is the existing situation? In the first place the railways are largely owned by the people—

directly through stock and bond ownership, and indirectly through policies in insurance companies and deposits in trust companies, savings banks, and the like, a part of whose assets are invested in railway securities.

The latest report of the Interstate Commerce Commission says that American railway stockholders now number 777,131; and Director General James C. Davis says that if the number of bondholders be added, the total of direct owners of railway securities will probably aggregate 2,000,000, or about the number of railway employees.

Including indirect owners, such as the policyholders and depositors referred to, the number of railway owners runs into many millions.

Moreover, the number of stockholders is rapidly increasing. For example, in 1913 the Pennsylvania had 86,212 stockholders, while in 1923 the number had increased to 141,433. Two years ago the Interstate Commerce Commission reported that whereas there were 154,610 stockholders in twenty principal railways in 1904, there were 627,890 stockholders in the same roads in 1921. Small investors have been buying old stock—comparatively little new stock having been issued during the period named—which, even of the best roads, has sunk to low prices compared with its former value.

Obviously some former heavy owners of railway stock have been selling on a falling market. Perhaps high income surtaxes have made their investment unprofitable for them, as, in their eyes, hostile railway legislation has made railway stock unattractive and even unsafe. But the really important fact is the widely spread ownership of American railways and the large and steady increase in the number of railway stockholders.

In the next place "the dray horse of the nation," as Director General Davis aptly and picturesquely describes our railway system, has been working on short financial rations for a long time. Not for fifteen years have even the most prosperous roads been able to get needed money by selling much new stock. This is vital because that is the best—in fact, the only thoroughly safe—way of raising funds for railway extension and improvement.

FRESH CAPITAL

Of course profits could well be devoted to that basic purpose, but, with some exceptions, profits have not been large enough to provide such betterments. Indeed, most roads have earned no profits at all for several years, and many have run at a loss. The favorite and wholly sound method of raising money for railway improvements and extensions

accepted everywhere in the world, is by the sale of new stock. This merely means getting men and women with money to invest, to put it into the railway business—the securing of new partners, as it were, in a continuous and continuing enterprise.

We must bear in mind that railways must have a great and steady flow of fresh capital; the upkeep of roadbed; the building of new side, passing and terminal track, the extension of terminal facilities; and, above all, the construction of additions and of spurs to main line, as well as the purchase of new cars, locomotives and other indispensable equipment, demand constant and vast expenditure.

The part of this that can not be taken care of out of earnings must be provided by selling stock—or by borrowing. But people will not buy stock unless the railroads are allowed to make enough to pay dividends on that stock.

The whole problem centers about this master element—the element of net earnings. The railways as a whole must be allowed to earn enough to keep up with traffic demands. If they do not they can not furnish adequate transportation. For a generation the ever-increasing tendency has been to reduce rates, regardless of costs, regardless of development, regardless of everything.

Even a well-known radical Washington corre-

spondent was recently moved to declare in one of his news letters that "saving in nothing else we are determined to make up for it in one lump by saving on railroad rates." That states the case, does it not? If so, is such an attitude reasonable? Is it intelligent? Is it even in our own selfish interest?

Is it not obvious that unless the railways are permitted to earn enough to keep going, government ownership and operation is the only possible alternative? And do we want that?—a question I shall presently consider.

YOUNG MEN AND RAILROADING

The financial plight of American railways and the connection between that grave condition and the excess of restrictive railway legislation suggests an interesting and portentous circumstance. Even at the risk of digressing, mention of it must here be made: Other great industries are beginning to pull out of railway service its most capable and ambitious men. Though as yet this has happened only here and there, so competent and trustworthy an authority as Prof. William J. Cunningham, of Harvard, declares that "the tendency is unmistakable."

Worse still, very few college men are now taking up railroading as their life work. Out of a post-graduate class in economics numbering 530 men

from 175 colleges in one of our foremost universities, only ten are entering the railway field.

The same phenomenon is happening in every American institution of learning. Young men can advance faster and make more money in many other industries of the first class, than is possible in a railway career; initiative, enterprise, courage, ability, vision are given free play and rewarded as they can not be at present in American railway service.

As said recently by President Emeritus Arthur T. Hadley, of Yale, "railroad administration must be made an attractive career for men of brains. . . . To-day the chances for independence are so curtailed that the career is ceasing to attract young men of the first rank."

Yet American transportation is by far the greatest business on earth, and the conduct of it requires more skill and resourcefulness than any other.

Moreover, under the rules and regulations to which railway managers must now submit, young working men of notable ability, force and ambition can not be advanced according to their merits through the grades and degrees of service as was the case with our railway presidents, most of whom rose from the ranks of labor. Brakeman, clerk, shop apprentice, rodman, call boy, draftsman, telegraph operator, member of surveyor's party, messenger,

section laborer, fireman, track working man—such were the occupations of well-nigh every American railway president at the start.

For instance, Samuel Rea, president of the Pennsylvania, began as a rodman; C. H. Markham, of the Illinois Central, as a section hand; Daniel Willard, of the Baltimore and Ohio, as a track laborer; the late A. H. Smith, of the New York Central, as a messenger boy; the veteran Marvin Hughitt, of the Chicago and North Western, as a telegraph operator; and so on.

That can not happen now. True, a young railway employee can be "jumped" to higher positions, but he can not be promoted steadily as he must be to acquire the knowledge and experience indispensable to railway management. Thus a natural source of future railway executives is dried up.

Among the nearly 2,000,000 American railway employees are thousands of young men who have in them the makings of railway presidents; but their qualities are bound and gagged by rules and regulations; no matter how worthy they are, swift promotion is impossible under the present system. This is a situation which organized labor can greatly if not entirely relieve; and in justice to its most capable young men as well as to the American people, organized labor ought to do it.

WHENCE THE MONEY

To return now to the methods of raising indispensable railway funds. What of railway borrowing? Up to a well-defined limit borrowing is all right, in fact an excellent method of getting money for the purposes named, since railway bonds furnish a safe security to those who prefer a sure if small return on an investment to taking a chance for a bigger but uncertain return which will fluctuate with the fortunes of the business and may fail entirely, as may be the case with railway or any other stock.

But beyond a certain point—say fifty per cent. at the very outside—established by the long experience of the business world, borrowing is an unsound and even dangerous practise.

Yet for many a long year American railways have had to borrow for purposes that should have been served by profits or by sales of new stock. They have been forced to buy even new and absolutely indispensable equipment—cars, locomotives, and so on—with borrowed money. The signs are abundant and unmistakable that the point is rapidly being reached where this can no longer be done except at a heavy loss; and pretty soon it can not be done at all.

As I write these words the newspapers announce several new issues of railway bonds of excellent lines, all for refunding too—that is, for paying off outstanding and maturing bonds, old mortgage debts, in short. Yet every one of these new railway-bond issues is offered at far below par, whereas formerly such securities of these same roads were snapped up at a premium. Moreover, the same newspapers on the same pages announce new bond issues of manufacturing and other industrial concerns at par or nearly so.

That partly explains why railways find it so hard even to borrow money on favorable terms and why they can not sell stock at all; they must compete with industrial bonds and stock, farm loans, local utility securities, and every other form of evidence of indebtedness used by productive enterprises of all kinds. None of these, except public utilities to a limited extent, is interfered with or regulated by the Government, or bound hand and foot by restrictive laws, or harassed by party politicians for election purposes, as the railways are.

But another and much more serious reason exists for the financial straits of American railways. Government interference with railway management, incessant political nagging of and attacks upon it, the resultant uncertainty as to the future, the instability

of railway legislation and other things of the kind have scared the investing public and made railway securities less and less attractive to it.

HIGH COSTS

Unlike other businesses, railways do not control their income or, in large measure, their outlay. In practical effect railway rates and railway wages are fixed by the Government. Also whether they make a profit or lose money, the railways must keep going; they can not shut down or quit business as other concerns can when forced to do so by hard times or long-continued deficits.

Moreover, railways suffer from high prices as much as any of us; more, indeed, because they are the largest buyers of commodities on earth. Their coal bill alone is stupendous, next in magnitude to their wage bill. Also the railways must keep in stock for instant use immense quantities of upward of 70,000 different articles of well-nigh every conceivable kind. While the cost of all these things has been mounting during the last twenty years, railway earnings have not been permitted to keep pace with soaring expenses.

For example, everybody shared the swollen and abnormal war prosperity before we entered the conflict—except the railways. They had to pay war

prices and war wages, but were not allowed to charge war prices or make war profits, although their earnings increased. This went on from the outbreak of hostilities in August, 1914, until our war declaration in April, 1917—almost three years.

The Government took over the railways as a war-time measure, and that twenty-six months of government operation was a desolating gap in railway business, heavily burdened as it had been. The desperate financial condition of the railways, brought about by the causes stated, was a weighty reason for government taking and operation.

But an infinitely more important reason—a conclusive and determinative reason—was that the Government did not have to observe the thousands of restrictive railway laws, state and national, which handicapped and interfered with private railway management. The obsolete and obstructive Sherman Law and all other legislation that in any manner stood in the way of free railway operation were ignored by the Government.

In its brief operation of the railways the Government scored a deficit of well-nigh $1,800,000,000. The roads were returned to their owners in a weakened condition, roadbed deteriorated, rolling stock and motive power impaired. No complaint is or should be made of all this, because the roads were

run as a war necessity, and there was no more waste or extravagance in railway operation than in most other government efforts during the struggle—not so much as in some. It was no fair test of the efficiency or economy of government operation.

In this wise closed the second period in American railway evolution; this was the situation that attended the opening of the third period, a stage of railway progress, be it said again and again, as logical, natural and necessary as those that had gone before.

The altered conditions out of which grew this third epoch were recognized in the Railway Act of Congress of 1920. Few legislative measures have received more extended consideration than did that now celebrated statute. Moreover, Congress had the benefit and availed itself of the profoundest thought and ripest learning in the country outside the Capitol—important provisions of the law were framed and successfully urged by business men, as we shall presently see; and the committee was assisted by the foremost professors of economics in our great universities.

A NATIONAL SYSTEM

Stating it in simple terms and in broad outline the new and constructive railway policy recognized

by the Transportation Act of 1920 was this: American railways are a system—a national system—of transportation for a people, and therefore must be considered as such a system, interrelated, interdependent and mutually sustaining. The National Government is concerned not only in regulating individual railways but is also and equally—even more, indeed—intent on assuring adequate carrying service to the whole country and to all the people; this purpose can best be realized by private ownership and operation under government supervision; and since the National Government restrains, directs, controls and interferes with railway management and operation in very many vital particulars, it is not only just to railway owners but absolutely essential to adequate railway service for the country as a whole, that the Government shall maintain an encouraging attitude toward railway transportation.

That policy originated in the brain of no one man; it grew out of conditions, was the child of a people's necessity, the offspring of natural forces. It is the new and constructive successor of the old and destructive practise of mere legislative hostility toward the railways and mere antagonistic interference with railway operation—unless, of course, we decide to abandon private ownership and operation altogether and adopt forever government ownership and

operation, which is inevitable, at least for the poorer roads, if the present policy fails.

The most striking feature of the historic Railway Act of 1920 that expresses this new and advanced policy of securing adequate railway service by an interrelated, interdependent and mutually helpful national railway system is that which directs the Interstate Commerce Commission in fixing rates to include the element of a fair return on the value of the property—a standard uniformly maintained by the courts and here recognized in affirmative legislation—and to establish a limit of what is such fair return.

MOST MISUNDERSTOOD

This is the famous Section 15-A of the law—the most talked about and the most misunderstood part of the statute, perhaps the most misunderstood legislation in American history.

For instance, it is commonly believed that this section was a scheme of the railways, whereas they were against it.

Section 15-A was the idea of the National Association of Owners of Railway Securities, an organization of insurance companies, savings banks, trust companies and other fiduciary concerns, billions of whose assets, as we have seen, are in the form of

approved railway securities, principally bonds; and whose many millions of policy-holders and depositors are vitally interested in the maintenance of the value of them.

Another popular misapprehension is that the fair return recognized by the law as a legitimate element of railway earnings is a guaranty, whereas it is a limited permission—or rather a permissive limitation or, to be more accurate still, a restriction on earnings.

The railways, as a whole, are allowed to make six per cent. profit if they can; if any or all of them earn less or run at a loss the Government does not make up the loss, or, except at the expense of other railways, help them in any way.

If any one railway earns more than six per cent. over and above expenses of operation and maintenance, payment of taxes, rents, and so on, it can not keep the excess, but must turn one-half over to the Government, retaining the other half in a special reserve fund which can be used only as the law directs, until this fund reaches the limit of five per cent. of the value of the road's property, after which the railway may use its earnings beyond that limit in any lawful manner.

But the vital point and the one of interest to us just now is that half of the profits of any railway in

excess of six per cent. must be surrendered to the Government for the benefit of railway transportation in general. This is called "the recapture clause" of Section 15-A.

So we see that instead of being a guaranty of profits this provision of the law is a limitation of income. Some of the richer railways would like to get rid of it and, last year, tried hard but in vain to overthrow it in the courts.

In ascertaining this permissive limit of earnings the Commission must treat the railways as one great national system, dividing them into rate groups or territories; and it is all the railways in such rate division taken as a whole that, in the aggregate, may earn six per cent. profit—not each road, mind you, but all of them in any one great railway division.

The average earnings of all roads in any rate group may reach six per cent. for the group; but if the earnings of any one road exceed that limit, one-half of such excess must be turned over to the Government by the road earning it. Or to state it in another way, the limit of earnings for the group is based on the value of the railway group as a whole, while the limit for the purposes of dividing excess profits of any particular road is based on the value of that particular road.

The commission has established four of these rate

groups—the Eastern, Southern, Western and Mountain-Pacific. As yet the combined railways of none of these divisions, taken as a whole, has earned profits up to the permissive limit, although several of the more prosperous individual roads have exceeded that limit.

EXCESS PROFITS

The policy of considering American railways as a national system which must give ample service to the whole country is many times expressed in this part of the law. For instance, in determining what is a fair return on the value of railway property the Commission must take into account "the transportation needs of the country" and the "necessity of enlarging railway facilities in order to provide the people of the United States with adequate transportation."

This is the first time in our history that our National Government concerned itself affirmatively with seeing that the nation is provided with adequate railway service.

What is to be done with the excess railway profits which must be turned over to the Government? In the answer to that question is the culmination of the policy of securing abundant transportation by a national interdependent and interrelated railway

system; for these excess profits above the permissive limit must be used by the Government "in furtherance of the public interest in transportation," by loaning money to railways for improvements and betterments or payment of debts made for such purposes or by buying railway equipment and leasing it to railways.

And here is the reason: Some railways run through thickly settled and highly productive regions, or have fortunate terminals, or are not loaded with expensive branches, or have other advantages—and so such railways are prosperous; whereas other railways run through thinly peopled sections having scanty productiveness, or are without good terminals, or have taken on branch lines which lose money, or are otherwise handicapped—and so such railways have to struggle to make both ends meet and often must run at a loss for long periods of time.

Yet these poorer roads can not be abandoned, since they are vitally necessary to the people they serve, who would be ruined if these railways were destroyed. Also it is clear, is it not, that if the Interstate Commerce Commission fixes rates so that such poor roads can live, other roads in the same group will thereby make extravagant profits to the injury of the people they serve; and, conversely, if the Commission fixes rates on which these prosperous roads could earn a

fair return, the poorer roads will thereby be driven out of business, to the disaster of the people they serve.

This was the problem which, heretofore, always had defied solution, because American railways had not been treated as a national, interrelated and interdependent system of transportation and because the Government had not troubled itself with the upbuilding and maintenance of an adequate railway service for all the people. As we have seen, the Government, during the second period of our railway development, was principally occupied in preventing railway misdeeds; and this, carried to extremes, resulted in obstructive and destructive governmental interference with railway management and operation.

To solve the hitherto so-called "insoluble problem" just described, Section 15-A requires that one-half of all railway profits earned by any railway above the permissive limit of six per cent. shall be taken by the Government and used to enable any or all railways "properly to meet the transportation needs of the public." The roads thus assisted by the Government, however, must pay six per cent. interest on the borrowed money and safeguard the Government as to leases of equipment and otherwise satisfy the Government as to ability to repay.

While helping weaker roads with money earned by the stronger, the Government takes no chances of loss, but secures itself and charges interest equal to the permissive limit of profits.

It is this taking by the Government of one-half the excess profits of any railway earning over six per cent. of the value of its property as described and the administration by the Government of the fund thus created for the benefit of railway transportation as a whole, that some of the strongest railways recently resisted so strenuously in the court.

RAILWAY VALUATION

Consider now the value of the property of the railways on which a fair return is supposed to be—but has not been—estimated by the Interstate Commerce Commission. Some ten years ago Congress enacted that the Commission should make a valuation of American railways. This was done because of incessant assertions that railway stocks and bonds were dropsical with water, and that the public was being robbed by means of excessive rates based on such fictitious values.

So came the physical valuation of American railways, far and away the greatest scientific appraisal ever made or attempted in the history of the world. It will be worth all it costs—$25,000,000 to the Gov-

ernment and nearly $60,000,000 to the railways—if it does no more than to set the public mind at rest on this fundamental matter.

As an example, by the way, of how actual expenses always exceed the confident estimate of those who wish the Government to embark on any project, it was sincerely believed and stated at the time of the passage of the valuation bill, by its advocates, that the cost to the Government would not exceed $2,500,000 and the same amount to the railways—$5,000,000 all told; which has now grown to more than $80,000,000, which, in the end, must be paid by the people of course.

For a full decade this physical valuation of American railways has been going on. A bureau of the Interstate Commerce Commission and the attention of one division of the Commission have been devoted to that work. Hundreds—at one time nearly 2000—of expert civil engineers, accountants, appraisers, investigators and other necessary employees have been engaged in the systematic and thorough performance of the prodigious task. The entire Commission is now actively considering valuation problems.

Many railways have earnestly protested against the tentative estimates thus made as being far below the actual value of their property. On the other hand, the governors and railway commissioners of

the states have been given opportunity to object that the Commission's valuation was too high, and that right has frequently been exercised. The states maintain at Washington a valuation solicitor and representatives who aggressively sustain the public interest. Seemingly nothing has been left undone to enable the Commission to form as just and accurate an estimate as is humanly possible.

The Commission has refused to accept as a basis of valuation earning power and the amount actually invested as shown by the books of the railways. Neither stocks, bonds nor any other forms of railway securities were taken into account. "We did not," said Edgar E. Clark, then chairman of the Interstate Commerce Commission, testifying in 1920 before the Senate committee in charge of the matter—"we did not regard their stocks or their bonds, and we declined to accept their book value as a basis."

One of the principal means of ascertaining the value of railway property was examination and appraisal of the physical property itself. Almost entirely prewar prices and wages were used, especially the five- and ten-year range of prices ending with June, 1914. Computation was thus made as to total costs of reproducing the railways at that time; and from the amount so ascertained was deducted a sum equal to the depreciation the struc-

ture had sustained. If the life of a bridge, for instance, is thirty years and the bridge had been used for ten years, one-third of the value of it, less allowance for salvage, was taken from the full value—and so on.

This often called forth angry remonstrance from the railways. For example, a certain road had extensive wharves which it had renewed from time to time. When the Commission's engineers deducted as depreciation half the value of the wharves the railway officials were furious, because they said constant repairs made the wharves as serviceable as if newly constructed. Numerous objections of that kind were made to the Commission's methods.

It is upon the value of railway property thus ascertained that the Commission is required by the law to fix the permissive limit of a fair return, considering also the other elements already described; and it is upon this valuation that railway rates are based to some extent.

The tentative estimate made by the Commission as of December 31, 1919, measured by the valuation then completed, placed the value of the entire property of all American railways at $18,900,000,000. The amount is now larger, of course, to the extent of additions and betterments since made to the physical plant.

OBJECTIONS TO THE VALUATION

The basic valuation work of the Commission will be finished this year, and it would seem probable that the final and definitive valuation may be well over $20,000,000,000. The book value of the railways themselves, which the Commission rejected, shows that some $21,000,000,000 have been invested in their properties. Had the present scale of wages and prices been used by the Commission in making its physical valuation the amount would have been much more—between $30,000,000,000 and $40,000-,000,000.

Objection is now sometimes advanced by those unfriendly to the railways to the Commission's basis of valuation—just as the railways themselves objected to the Commission's methods on the grounds mentioned. These critics say that only the original cost of the railways should have been ascertained and that the railways are not entitled to the increased value created by population, production and other elements of our economic and social life. Does this appear to be reasonable and just?

If farm land is now condemned for right of way, is not and should not the value of that farm land be that of to-day rather than that when the ground was

first broken fifty years or more ago? If the railway has increased in value because of the settlement and improvement of adjacent land, has not the adjacent land also increased in value because of the railway running near it? Would not the adjacent land lose most of its value if the railway were removed?

Moreover, with rare exceptions the original cost of the railways can not now be ascertained. Most of them were first built between thirty and eighty years ago; no uniform method of keeping property accounts was required by law until 1907; and many early records do not now exist.

Another suggestion is that the value of railway property should be measured by the current market price of railway securities. Is this fair or practicable? Not so long ago American railway stocks and bonds were considered at home and abroad as among the best investments in the world, and the prices of them were correspondingly high; in late years they have been considered an uncertain, even precarious investment, and the prices of them have correspondingly fallen.

Would not valuation of the property by present market prices of these securities, therefore, result in practical confiscation? Does any American want that done? At the very best, would not such procedure surely lead to determined and long resistance

in the courts? And can anybody doubt the outcome of such litigation?

Is the argument sound that the current price of railway securities is a just basis of value of railway property because the railways can actually be bought in the market at such depreciated prices? Does not everybody know that the moment such buying began prices would rise and keep on rising? Are not the present low prices caused by the fact that the demand for railway stocks is negligible and for railway bonds diminished?

Is it not strange that consideration of this very fact of depreciation in market value of railway securities was earnestly opposed when the valuation bill was before Congress in 1913 by those who now advocate this same security depreciation as the true basis of railway valuation?

So is it not obvious that the Commission's plan of valuation was reasonable, just and scientific—in fact, the only possible method of making an accurate estimate such as the statute and economic law alike require? And if we can not trust the findings of so upright, impartial, competent and experienced an official body as the Interstate Commerce Commission, is there any earthly agency whatever that can be trusted?

Are those who make unending attacks upon rail-

ways the only honorable and intelligent persons concerned in the solution of our railway problem? Of course they would make no such claim for themselves; but, heartily conceding their sincerity, is not that the position in which they place themselves? And do they really want to remain in that attitude?

The law says that in fixing railway rates and establishing a fair return the Commission shall have in mind the "necessity of enlarging railway facilities." That is hardly second in importance to the maintenance itself of our present railway system. The country is constantly and rapidly growing in population and production. In former times the railways kept abreast of this human and economic advance—ahead of it indeed. But, for the reasons given, that railway expansion stopped many years ago, and since 1917 more miles of main track have been abandoned or torn up than have been constructed.

No graver economic situation ever confronted any country. It can not be relieved unless money is forthcoming with which to renew railway building and improvement; and that money will not appear until the confidence of the investing public in railway stability is restored. There are signs of returning confidence, but it will come fully and permanently on only one condition—the stability of railway legislation and the steady increase of railway earnings.

The only possible alternative is government ownership and operation, which I shall presently examine.

CONSOLIDATION

The new period of railway systemization and governmental encouragement is further recognized in the Act of 1920 by the legal sanction of railway consolidation with the approval of the Government. The Sherman Law is repealed so far as that medieval statute applies to railways, just as economic necessity has compelled the suspension of that out-of-date legislation in other cases. Thus some elasticity is restored to our transportation system, albeit under the watchful eye and restraining hand of the Government.

Nothing could be more complicated and delicate than the question of railway consolidation. Many experienced men think that a system can be made so extensive that it is physically impossible for a railway president to give personal care to its operation, as such an official must do. The National Industrial Traffic League, the national organization of shippers, has twice gone on record against compulsory consolidation.

Only one phase of this intricate subject seems to be clear—that, for the present at least, it must be left to the operation of natural economic forces and the

judgment of railway managers, security owners and shippers to work out suitable adjustment of railway lines. But for the Sherman Law much of this would have been done long ago so far as practicable and beneficial, as the National Industrial Conference Board points out in its great report on the railway situation.

Even if the railways do succeed in arranging consolidations, the Government, under the Railway Act of 1920, must approve them before they become effective; and this will be done only if such mergers are in the public interest and carry out the idea of a national railway *system*. While working out their plans railway managers realize that the Government will say no unless those plans are for the common good. A supreme power, that sovereign "no," but at least effective in preventing schemes which might possibly wrong the public.

The final feature of the Railway Act of 1920, which to some extent carries out the policy of considering all railways as a national interdependent and interrelated system, is that establishing the Labor Board. The wisdom of this device is questionable, as I shall presently show.

Such, in general, are the provisions of the act heretofore reviewed, which begins the process of conforming legislation to existing conditions throughout

America—begins harmonious government supervision in the third great phase in the development of American railway transportation. What more should be done in the same direction? For most certainly no backward step should be taken.

Reactionism is as foolish and ruinous in the matter of railway evolution as it is unintelligent and harmful in any stage of human progress.

INJUDICIOUS REGULATION

So no more mere useless hampering of railway management; no more mere obstructive governmental interference with railway operation; no more mere senseless clogging of the wheels of transportation; no more purely vindictive legislation; no more mere campaign assaults on the railways for election purposes. All these things are old stuff—incidents growing out of the second period of American railway advance—a day that is over and done.

Adequate carrying service for all the people is more important than the gratification of personal or party ambitions; nor can the well-being of all the people be permitted to be impaired by incasing conditions in the strait-jacket formulas of those obsessed by sheer hatred of the railways.

When such preëminent authorities on transportation as Prof. William Z. Ripley, of Harvard, and

such masters of practical business management as Henry Ford, agree, should we not give some weight to their combined and definitive judgment? In his account of his life work the great manufacturer, speaking of railway restrictions, says that "to-day we find the railways hog-tied in a mass of rules and regulations"; and Mr. Ford adds in disgust that "business can not be conducted by law."

Professor Ripley in one of his careful books on the subject declares that "the present danger is less that clumsy and injudicious regulation may bring hardship to investors, than that it shall defeat its own set purpose and its proper aim, which is the attainment of an adequate public service at reasonable rates by the people of the United States, dependent upon the railway as upon no other single instrument for their well-being day by day."

If any modifications of the new railway law are made should they not strengthen the policy of railway systemization and governmental encouragement of adequate transportation for the whole country? If this character of alterations is not practicable the law should not be changed at all. Far better let it alone than mangle it. If constructive amendments can not be made, at least destructive tinkering must not be permitted.

With this understanding, let us consider sugges-

tions that might perhaps be found helpful. Would not a voluntary national incorporation act for railways assist in simplifying the railway tangle? For twenty years I have advocated such a measure for all corporations doing interstate business; certainly it would stop at the source evil practises which the Sherman Law has merely aggravated, and at the same time relieve honest business from present handicaps.

Might it not with advantage be applied to interstate railways at least, which surely are national if anything is or can be national? This plan does not necessitate any alteration of the Railway Act of 1920. Since discussion of it requires a great deal of space, only mention of it is here made. I merely suggest and do not urge it—I am not wedded to this or any particular formula.

CONSTRUCTIVE SUGGESTIONS

What, if any, changes might be effected in that law itself that would strengthen it? One of the chief obstructions to prompt and sufficient railway service has been the lack of system in the handling of freight cars. They pass from the roads owning them to other roads; and, heretofore, if these roads needed freight cars they simply kept those coming to them in the flow of business as long as they wanted

them, instead of promptly returning them to their owners.

For example, a loaded car goes from a western to an eastern railway. From the time of receipt until the car is returned the receiving road must pay the sending road one dollar a day—the estimated daily expenses, depreciation and interest on the value of a freight car—for every day that car is kept on the tracks of the receiving road. This expense is supposed to be sufficient inducement to secure the quick return of the car; and so it is—except when the receiving road needs extra cars. In that case the car was formerly kept away from its owner, it being cheaper for the road holding it to pay the daily charge than to do without cars or buy new ones.

Thus roads were sometimes short of their own freight equipment when most needed, and freight congestion on such lines resulted, with heavy loss to shippers. Or there was an overabundance of cars on a road that could use them but did not seriously need them. And throughout this unsystematic, unbusinesslike car shunting and car poaching, ran the grave matter of the repair of cars that got out of order.

The owners of railway securities, who, as we have seen, framed Section 15-A and got it into the law, urged at the same time the adoption of a method of

car service which, they claimed, would solve the problem of car shortage, car congestion and car repair. They proposed that Congress charter a corporation, to serve without profit, the directors to be practical railway managers chosen by their fellow railway executives, which corporation would take over all cars belonging to the railways, distribute them among the roads according to traffic needs, and provided standardized repair methods.

But the plan was not acceptable to the railway managers and did not become a part of the law. The railway-security owners are now urging it again.

If the trouble persists would it not seem that something of the kind should be done? The public must have prompt and ample railway service; and car shortages, freight congestion or anything else can not be allowed to prevent it. The railways themselves have taken up this vital matter and report great progress. The American Railway Association, a voluntary organization of the railways, has established a car-service division of its own to handle this very problem.

If there is a car shortage anywhere, this association wires roads having extra cars to send them forthwith to the place of need. It anticipates movements of commodities and takes measures in advance to meet transportation emergencies. For instance, long be-

fore the wheat harvest last year this railway association was busy storing freight cars at available points in the West. The result was an unprecedentedly prompt movement of the wheat crop.

If such prevision continues, perhaps the problem of car distribution will finally be solved. But it all depends upon the obedience by individual railways to the requests of the railway association, which is a matter of grace and not compulsion on the part of the railway managers to whom the request is sent.

Might it not be helpful to give the railway association or the agency proposed by the security owners legal authority to order cars to places of car shortage and freight congestion, unless the railways themselves continue fully to perform that function voluntarily, as they insist they are now doing? Of course no new law should be enacted without real and lasting necessity for it; excess legislation is one of the gravest evils of the times, as everybody knows.

What other helpful changes in the law might be made? It is conceded that the Interstate Commerce Commission is overburdened with conflicting duties and inharmonious requirements. The commissioners deserve the praise and gratitude of the public for the doing of excessive labor with notable ability and without complaint. Everything that Congress can

think of and can not or will not do itself is shouldered off on the Interstate Commerce Commission.

It is a legislative body—a congress all by itself over the railways, yet restricted and directed by another Congress sitting in the Capitol. Its regulations have the effect of laws and fill volumes. Rules made by it are pure legislation and are distracting in number and complexity. It passes on millions of rates.

It is a court—it hears and determines cases. Thousands of its judicial decisions are found in eighty-five bulky reports. They include every conceivable controversy that can arise under the extensive and complicated railway statutes—reparations, undue prejudice, discrimination, long and short haul, and all other subjects of dispute.

In controversies over long and short haul alone, decisions have been reported in 638 cases, not to mention over 8000 other such decisions not reported. Thousands of cases involving the reparation clause have also been decided. Thousands more controversies under other sections of our voluminous railway statutes have been heard and disposed of.

All this is in addition to the numerous investigations which the Commission must conduct. In the last ten years the Commission on its own motion has made over 200 investigations. In 1923 twenty-five

investigations were instituted. Other varied and crushing labor is required. Taken all together, the demands made by law upon the Interstate Commerce Commission constitute a sum of functions and duties physically and mentally impossible for human beings to perform.

This is shown by the startling fact that, when sitting as a court, commissioners hearing a case are often called to other work, must leave the bench and intrust an examiner to listen to evidence and argument, and make a tentative decision upon which that of the Commission is based.

This vast and complicated agency is also the executive arm of the Government in railway affairs. It sees to the enforcement of safety-appliance laws, hours-of-service acts, and many other laws, rules and regulations of a similar nature, all of which call for single-headed administration.

Moreover, the law makes the Commission a banker—it receives and deposits money, invests it, loans it on interest. It is a merchant, too, and buys and leases cars, locomotives and other railway equipment. Also, it is a master accountant and supervises the bookkeeping of American railways.

Ought not the Commission be relieved of all but large matters—such vast and vital subjects as rate regulation, discriminations, long and short haul,

security issues, "the revolving fund," and the like? Any one of these is in itself a big job, and all of them together are as much as any one body of men can take care of properly.

Rate supervision alone is a prodigious task. In applying the long-and-short-haul provision of the law the Commission decides the fate of cities, states and sections—it is an imperial power.

The granting or refusal of issues of railway stock, bonds or other securities controls railway extensions, improvements, betterments and every phase of railway progress; indeed the Commission holds in its hands the financial solvency of our railway system.

The administration of the great fund provided by the "recapture clause," already described, is a tremendous responsibility and a stupendous task—big adjectives but not too extreme and emphatic to describe the labors and duties of the Commission in using the immense sums of money to be gathered under this provision of the law for the general benefit of our far-flung railway transportation system.

Does not the careful performance of these weighty, delicate and complicated tasks require that other distracting labors be taken from the Commission's shoulders? Could not the administration of the acts concerning boiler inspection, safety appliances, ash

pans, hours of service, and the like, better be imposed upon some other agency of the Government?

Also, should commissioners be diverted from essential duties by small and vexatious probings into matters of mere business judgment by railway managers? And should a constant and voluminous stream of reports on trifling matters be required of the railways?

If it is thought unwise to put annoying and purely administrative labors in other hands, is it not clear that at least additional heavy and complicated work should not be superimposed on that with which the Commission is already overloaded? For example, should the regulation of the coal industry be required of the Commission, as is now proposed? Is it possible for that body to perform so vital a function in addition to the duties which it already must discharge? Are we not likely to break down that already elaborate and extensive machinery?

Railway operation ought to be freed from burdensome legislation that is no longer necessary. Congress might create a joint committee to go over our railway laws and report what parts of them hamper railway service without good results to the public, and then such cumbersome mechanism should be got rid of. Is there not greater need of simplification and reduction of railway statutes than there

is for the multiplication and complication of them?

THE LABOR BOARD

The Labor Board was an expedient improvised to meet an emergency. The wisdom of such a device is doubtful, to say the least. It interposes a governmental machine between men and managers and is an invitation and encouragement to both to take their disputes before the Board instead of settling them at first hand by personal conference and mutual adjustment. Indeed, the greatest need of both management and employees in practical railway operation is personal contact and face-to-face discussion of mutual grievances.

Moreover, the Labor Board has become a house of strife within itself. That was inevitable from the beginning, because antagonism is inherent in the very constitution of the board. Three members represent the men, three other members the managers, and the remaining three members the public.

It is as if when making up a jury, one-third should be selected by the plaintiff, one-third by the defendant, and one-third by the court from the general and disinterested panel.

See how it has worked out. Here is the official

record of the votes of these irreconcilable parts of the Labor Board in all sorts of controversies:

Group and Member	Vote Favorable to		Total
	Carrier	Employee	
Public:			
Hooper	301	524	825
Hanger	205	687	892
Barton	413	283	696
Employee:			
Phillips	7	586	593
Wharton	14	910	924
McMenimen	51	822	873
Railroad:			
Higgins	685	206	891
Elliott	830	96	926
Baker	884	17	901

It is an impossible situation—against human nature and economic law alike. It has not mollified antagonisms—it has inflamed them. If, as many think, it should be continued since it is now established, should it not be constituted of harmonious rather than irreconcilable elements?

Do not the votes above given show that only the members representing the public try to be impartial? If so, ought not all members of the board be drawn

from the public? Should a court be composed of partisans?

At the very least the Labor Board should be reconstituted immediately. Personally, I should like to see it abolished; the employees, the managers, the public—all would be better off without it. But if it is not practicable to repeal that section of the law, surely it can be amended so as to make the board as impartial as a court or a jury.

And is it good business sense, is it common sense or sense of any kind, for an agency of the Government in Chicago to fix railway wages and another agency of the Government in Washington to fix railway rates, there being no legal connection or relationship whatever between the two agencies? Should not the rate-making functions of the Interstate Commerce Commission and the wage-fixing duties of the Labor Board be coördinated?

Every possible encouragement must be given to, every possible obstacle removed from, personal contact of managers and men. The spirit of mutual interest must be fostered in employees and employers alike. Our lawmakers must refuse to be the tools of or furnish legislative weapons to either; let both be made to understand that it is to the advantage of each to act in harmony instead of hostility, and that the public interest is supreme.

Organized labor could work wonders in this vital matter. A promising sign that labor leaders are beginning to see this is the experiment on one great railway system of a union expert working in the shops, to increase efficiency of men and improve output of labor. A thoughtful account in a recent railway periodical by O. S. Beyer, Jr., the union official now engaged in this service, indicates that one tryout of this idea is, thus far, encouraging. And Mr. Beyer's statement is no more than fair that the management, on its part, must "declare its willingness to help labor in the solution of its acute difficulties."

Is not that the true spirit—mutual helpfulness? Why not? Both managers and men are equally interested in the success of the road they both serve. Neither can prosper except as the road prospers. Coöperation! It is the meaning of the times if industrial society is to advance—nay, more, if it is to be saved.

If the public statement of William H. Johnson, president of the International Association of Machinists, that the policy of that organization now is along this line and that "unions and managements in coöperation may, with proper technical advice,

discover and apply more efficient methods in a way that would be impossible for management acting alone," represents the changed view of organized labor, the sun of a better day has risen.

For the commanding need of the hour is mutual effort by management and men in furnishing transportation to the American people.

But if constructive legislative modifications of our present Transportation Act are not practicable at the present time, let the law alone. Perhaps, all things considered, this course may be best. In the past year—the only year since the war that even approached normal conditions—the railways have moved the greatest volume of traffic in the history of the world. They have far exceeded their best efforts in the past, and this despite the forbidding conditions described.

This achievement of our railways in 1923 is a tribute to and a proof of the energy and resourcefulness of American railway managers. Also, as said, there are indications that the confidence of the investing public is returning. Seemingly railways and investors had expected a period of legislative calm after long years of incessant storms.

Is it not plain that if American business can be assured of stability in railway legislation, if the railways are permitted to earn enough to attract invest-

ing capital, the recovery of our transportation system will go forward? But if this assurance is not given, this permission not granted, it is as certain as sunset that railway decline will set in once more and government ownership and operation will result.

GOVERNMENT OWNERSHIP

Very well! Why not? Many earnest and determined persons think that would be best in any case. As Prof. Frank Haigh Dixon, of Princeton, himself an opponent of government ownership, well says, "No special form of organization has any inherent right to existence in a democracy."

Private railway ownership and operation is not a divine institution—and neither is government ownership and operation. Each must justify itself, each stand or fall on its own merits.

In such balanced scales let us weigh the claims of government ownership and operation just as, with like fair-mindedness, we have examined the evolution of American railways up to the present time. The only thing to be decided, the only thing that matters, is what plan will give all of us the best and least expensive railway service.

I have no terror of government ownership and operation as such—I only think it a very bad thing for the American people. So let us examine justly

the reasons for and against it; and, while doing so, let us bear in mind that if the weak roads are not assisted or permitted to earn enough to keep going, government ownership and operation of those lines is unavoidable and imminent. For, of course, the poorer roads can not be abandoned since the well-being of millions depends upon them.

It is said that if the Government ran the roads exploitation of the public by railway manipulators, such as was perpetrated in former times, would not be possible. True—but beside the point. For nothing of that kind can be done to-day without committing a crime.

Railway officers, directors, attorneys, persons or concerns selling and everybody taking part in marketing railway securities not approved by the Government are included; heavy fines and long imprisonment await all of them. Even acquiescence in such transactions is made criminal.

So drastic and comprehensive is this provision, so autocratic the powers given the Interstate Commerce Commission over railway securities, that grave doubt is aroused as to the wisdom and prudence of this section of the statute. If applied to other industries would not American business come to a standstill?

However, there the law is and there it will remain. So old-time stock-and-bond manipulation simply

can not be done to-day and is not attempted. Those who urge government ownership on this ground are behind the times.

Yes, but what of the past? Are we not paying tribute on that? No; the Government's physical valuation of railway property as above described now indicates that the final amount may not be far from the total of all outstanding railway securities. Indeed, it would seem possible that it may be more.

In any case ought we not get the definitive report of the Interstate Commerce Commission upon the value of our railways before taking measures that involve valuation—especially measures based on mere assumptions? Is not that reasonable? We shall not have long to wait.

Is it not possible that this charge of overcapitalization has been somewhat overworked? Compare the capitalization of American railways with those of Europe. Those of Germany are capitalized at nearly twice as much, of France more than twice as much, of England almost four times as much per mile as are American railways. The reasons are solider roadbeds, heavier bridges, reënforced tunnels, and many other similar factors.

Accordingly it costs nearly twice as much to haul freight on German roads, even more on French private roads, still more on French state roads, and

over four times as much on English roads as it costs to haul freight on American roads—though the English charges cover door-to-door service.

But discriminations! Are not monopolies built up and maintained by means of them? Are not rival business concerns robbed and ruined? Not unless the law is flagrantly violated and the violation condoned and connived at by the officers of justice. Such practises are also now made criminal, with heavy fines and long imprisonment as punishments, just as is true of the issue and sale of unauthorized railway securities.

If discriminations are now made the law is violated, our officers of justice are negligent, incompetent or culpable.

I have little acquaintance with railway presidents, but Senator Albert B. Cummins, chairman of the Senate committee having charge of railway matters, who has made this subject a life study and whose ability, experience and truthfulness are admitted by all, says in a signed article!

"I have had opportunity such as few men have had to observe and study the competency and honesty of our present railway management, and I desire to say that, with here and there an exception, railway managers are as competent as the managers of other great enterprises of which we are so justly

proud, and they are just as honest as other men engaged in the laudable effort to make profits for those whom they represent."

From personal experience and observation, so eminent and informed an authority as Professor Cunningham denies banker control. In his recent notable book, *American Railroads*, he testifies that he knows from personal knowledge that no such influence was or is exercised on the typical railroad.

Professor Cunningham is not only a teacher but a practical railway man with years of experience in railway management and intimate personal acquaintance with railway methods and policies. His statement is, therefore, first-hand testimony.

Particular appeal is made to organized labor upon the ground that a "banking combine" dominates the railways and forces railway managers to adopt and execute plans and policies hostile and oppressive to labor. The action of the roads toward the railway shopmen in the settlement of their strike in 1922 is cited as a proof. If this is so it is very serious and should be stopped at all costs.

But railway executives were not of the same mind and adopted radically different policies in disposing of that controversy. For instance, when the men asked to be taken back some important roads accepted while others rejected the proposal. The

Baltimore & Ohio, the New York Central and several other lines granted the request of their men subject to the rights of the new men employed, and made an arrangement with them known as "the Willard-Jewell Agreement" which seems to be working well; while on the other hand, the Pennsylvania, Illinois Central and most other railways, did the exact opposite.

The Erie and the Southern acted differently throughout the whole trouble—yet both are commonly referred to as "Morgan roads." The Union Pacific has a heavy interest in the Baltimore & Ohio and their banking connections are the same; yet these two roads parted company on this matter. In other vital features of labor policy, railway managers pursue radically different and well-nigh hostile courses.

Is there not another reason for banking membership on boards of railway directors?—and a very plain and simple reason? Just as the railways are the heaviest buyers of commodities, the largest employers of labor and conduct the greatest business in the world, so their financial transactions exceed those of any other single industry on earth. In such matters as the issuing and selling of stock, bonds, certificates of indebtedness is the true field of the investment banker on boards of railway directors.

To do any one of the other things charged, is to commit a crime.

Very well! People having money to invest usually do not buy securities from the concerns issuing them, but from and on the recommendation of favorite banks and brokers. Investors rely on them, rather than on the issuing company directly. This is true of the stock and bonds of even local corporations. Those who object to this process must quarrel with human nature. People simply prefer to make their investments in that manner. It is the age-old fact of the middleman in human transactions.

AN IRREVOCABLE STEP

If none of the above reasons is valid, what other reasons are advanced for government ownership and operation? Would the railways be better run than they now are, the people be more efficiently served, rates be lower, wages higher, transportation more speedy and convenient? If so, by all means let us try the experiment.

But that word "experiment" is the first stumbling-block, for government ownership and operation would not be temporary—it would be permanent. All students of the subject agree on that. Professor Ripley thus states the conclusion of all scholars as to government ownership and operation of American

railways: "Once accepted, there can be no withdrawal." That fact is plain to the man in the street or at the plow or in the factory or store.

Who would take the railways off our hands if we did not like the experiment? And even if private capital could again be massed in such quantities as to buy back the railroads, is it not certain that such purchase would only be made at a great loss to the Government? That, of course, would mean a loss to the taxpayers.

At the best we should probably be forced to grant operating concessions to private corporations with absolute guaranties of operating revenues and also profits, to induce those corporations to take off our hands the operation of the roads, just as Italy is now planning to do. Is that an attractive prospect?

Under government ownership who will pay the more than $300,000,000 of taxes which the railways now pay every year to the states and the nation? Somebody must pay that vast sum. The Government will not; it does not tax itself. Who then? The people, of course—all of us. The annual taxes now paid by each citizen would be increased by his proportion of that sum.

Would government ownership and operation give us lower rates? Would not the Government have to buy material just as the railways now buy their

material? Could the Government buy more cheaply? Could it make better bargains? Would government purchasing agents have greater incentive for economy?

That has not been the experience of our own or of any other government in the past. Did not the war reveal a deplorable lack of business methods formed during the long years of peace in the purchase of army materials? And is it not the same in other purchasing branches of the Government?

Would the Government reduce rates by cutting the wages of railway employees? Of course not. It is not human nature to expect Congress to do anything of the kind; and we know that Congress would not do it. On the contrary, is it not much more likely that this important part of railway expense would be heavily increased? Was not this done when the Government did run the roads, even though the nation was at war?

If the Government were to make railway rates lower regardless of the expense of running the roads, the result would be, of course, an annual loss. How would this loss be made up? By taxation, of course, and in no other way. So, even if railway rates were arbitrarily reduced, general and individual taxation would be correspondingly increased, would it not?

At this point we face another certain source of

railway expense under government ownership: Branch lines would be built, stations erected, and innumerable other things done from political motives instead of from economic necessity. For many years we have seen the working of this system in congressional appropriations for public buildings, river and harbor improvements, and the like.

Expenditures of the public's money for such purposes are, in political campaigns, used as proof that those who have secured such largess from the National Government have been looking out for their particular districts and states.

Would not the same plan work if the Government owned and operated the railways? If not, why not? Would not representatives and senators from districts and states through which an unproductive railway runs insist that it be richly maintained, even at a loss, since the entire American people would have to pay for it? Would not representatives and senators from districts and sections where new branch lines were demanded work to have those lines constructed, even though it were plain that they would lose millions every year?

And would not deals and bargains for votes be made with other representatives and senators who wanted votes in return for some similar enterprise requiring an appropriation? If this were done is it

not obvious that expenses for railway construction and maintenance would be multiplied? If so would not the mathematical result be the multiplication of taxes—or the multiplication of railway rates?

And still more taxes! The purchase of the railroads by the Government would add at least $20,000,000,000 to our national debt; for how could it buy the railroads for less than the value of the property as determined by the Interstate Commerce Commission? So that would mean, would it not, a doubling of our national taxes before the Government could even take charge?

Would government ownership and operation give us better service? Does it not seem reasonable to suppose that the contrary would happen? A vast government machine, made up of and run by government employees, would then do the work now done by alert experienced managers who have every incentive to render good service. Would government employees have such incentive? Do they now have such incentive in our bureaus departments?

There are many thousand fewer employees under private operation to-day than there were four years ago. Yet even now there are upward of 2,000,000 railway employees, and with government ownership and operation this vast army would become government employees by a stroke of the pen; and these

2,000,000 represent a total of not far from 3,000,000 voters.

When these are added to the more than 500,000 employees now on Federal pay-rolls, and the 1,000,000 or more votes they represent, we see the extent to which the bureaucratic control of the Government would be increased.

Also, we see another reason why we shall never be able to free ourselves from government ownership, once we have shackled ourselves with it.

FOREIGN RAILWAYS

We are told that government ownership and operation is a success in foreign countries. What countries? Germany? Yes, but under the most compact and efficient civil service the world has ever seen; and Germany, be it remembered, even before the war, was only about two-thirds as large as Texas, and with nearly 70,000,000 people. Not Canada—at least not yet; or perhaps it is too early to judge the results of Canada's gallant experiment. Not England—British railways are privately owned and run. Not France—most French roads are also privately owned; the Government assisted in building and equipping them, they are made monopolies by law and are operated under government guaranty of dividends! Moreover, in England, France and

every other country, not only in Europe but the world over, government regulation of private railway management and operation is moderate and simple compared with that of the United States.

Belgium owns and operates about half her railway mileage, Holland more, and Switzerland still more; but these countries are no larger than one of our medium-sized states, are densely populated, and their people trained to habits of thought and conduct quite unlike those of our widely scattered 110,000,000 human beings.

Also, the tendency, even in these little countries as well as larger nations, is away from government ownership and operation. Perhaps these figures may partly explain this recession! In 1921 the French state railways scored a deficit of over $85,000,000, those of Italy more than $200,000,000, and so on.

At this moment Italy is considering plans to get rid of government operation by giving private companies concessions to operate the roads, the Government to guarantee to these private companies the receipt of a specified revenue; and all profits over seven per cent. to be divided with the Government. As we have seen, that is the very best we could hope to do if our Government took over and ran the roads, failed and tried to get rid of them.

Nevertheless, that is what we are coming to and rapidly, at least so far as feeble and losing roads are concerned—unless they are maintained in some way, whether by consolidation, government aid at the expense of prosperous roads as provided by Section 15–A of the law, more earnings or other sustaining plan, it is well-nigh certain that the Government will take and run them.

But if we reject government ownership and operation, what shall we do? Obviously, help to make private ownership and operation successful. We have made legally impossible the old and evil practises that justly aroused public resentment against the railways in the past. That work is done so far as law can do it; and if any of the former misdeeds are now committed our public officials are at fault.

THE NEW DAY

Consistent with the public interest, railway managers must be given such freedom of action as that enjoyed by other business men who direct large industries. The object should be to encourage rather than to discourage the initiative, enterprise and resourcefulness of those in charge of the nation's transportation.

On their part, railway managers have an inviting field of labor, not so dramatic and charged with

adventure as that of bygone days, but even bigger, far more delicate and equally important.

Useful and practical consolidation of lines, carefully thought out extension of systems, development of terminals, elimination of waste—matters like these challenge the best efforts and highest constructive ability of railway managers.

Contact with the public, molding the opinions of communities and being molded by them, contact and coöperation with employees in the mass, estimating the future of the regions through which their roads run, arousing and joining in the spirit of productivity—things like these require the address and vision of statesmanship.

When added to the concrete labor of conducting the transportation of the most numerous, active and prosperous people on earth, the formulation of financial and other basic policies required by that mighty service, the domain of effort and achievement opened by the modern conditions described, is rich in attractive possibilities.

I would do away with vindictive laws which serve no good purpose and make difficult the realization of those possibilities by railway managers. I would encourage mutual confidence and helpfulness between them and the communities they serve. I would remove every obstacle in the way of personal contact

between them and the men they employ. I would give freer play to human nature, good sense, and the spirit of adjustment, which, in the end, must largely work out our conflicts, difficulties and problems.

So forward with good will into the new period now at hand, coöperation our watchword, mutual helpfulness our ruling spirit. Thus shall we realize a promising future. All hands to the task, then, and steady she goes.

IV

REPUBLIC OR BUREAUCRACY

An Ominous Situation: Regulating Industry: Handicapping Production: the Descendant of Autocracy: Gigantic Pay-rolls: Inefficient Executives: Mountains of Mail: Miles of Red Tape: Paralyzing Our National Initiative.

A TYPICAL American humorist recently observed that we soon may expect government regulation of the sending of Christmas cards. This regimentation of good cheer will be managed, he predicted, by a government bureau at Washington to which application must be made in August for permission to send greetings the following December.

The mails—which send government matter without charge except to taxpayers—will, he said, carry questionnaires to all adventurers into the realm of kindly remembrance; and, at any time within thirty years, government inspectors from Washington will, unannounced, visit every locality to ascertain and adjudge whether the Christmas-card law and all the interpretations thereof and rules, regulations and

exactions relating thereto made and provided by the Federal Christmas-card Bureau in Washington have been complied with.

The humor in this grotesque imagining is that it hits off the extravaganza of government control now being perpetrated upon the American people. The spectacle of bureaus as drill-sergeants, goose-stepping industry and trade and, indeed, the whole economic life of one hundred and ten millions of people living in a far-flung, ocean-bound country, is as comic as it is irritating.

Serious and thoughtful persons add weighty protests to the drolleries of our fun-makers, and these objections come from unexpected quarters. For instance, in its carefully reasoned and uncommonly well-written report, the Executive Council of the American Federation of Labor at the annual Convention of that body at Portland, Oregon, last October said this:

LABOR, BUSINESS, SCHOLARSHIP

"The largest freedom of action, the freest play for individual initiative and genius in industry can not be had under the shadow of constant incompetent political government interference, meddlesomeness and restriction. . . . The continuing clamor for

extension of state regulatory powers under the guise of reform and deliverance from evil, can but lead into greater confusion and more hopeless entanglements."

With forthright courage this pronouncement of the workers condemns bureaucracy "even at the cost of being branded as reactionary by those who do but little save propound formulas based on Utopian thought and devoid of the benefit of experience and of any cognizance of our fundamental social structure, our industrial life or our national characteristics.

"The ruthless drive of purely individual aim and ambition has given America tremendous industrial giants. Great abuses have accompanied great achievements. But what is frequently overlooked is the fact that the ambition to build has been the driving force behind our most remarkable strides.

"The abuses, terrible and costly as they have been, have been largely coincidental." And, concludes this indictment of over-government, "our people can not live and thrive under the régime of bureaucracy that threatens"—a fact proved by "the growing number of boards, commissions and tribunals."

These short clear paragraphs are statesmanlike. They might have been written either by Jefferson or Hamilton, by Madison or Marshall, by Harrison

or Cleveland—so fundamental are they and charged with public wisdom.

For a long time business men have been saying that government interference with the industrial activities of the people—which is what business is and all it is—is a handicap to production and exchange; but, until Labor spoke, their word was dismissed as the whining of "the interests," an apt and much-needed phrase when first employed, but more misused within the last few years than almost any in our economic and political history.

Take, for example, these moderate and well-nigh timid statements of sound principles, found in the resolutions of three recent Annual Conventions of the Chamber of Commerce of the United States:

"The very essence of civilization is that there be placed upon the individual only that degree of restraint which shall prevent his encroachment upon the rights of others." "Individual initiative, strengthened by education, safeguarded by publicity, stimulated by active and free competition, is the guarantee of sound national progress." "The foundation of all enterprise is primarily that of service to the community and this service is most effective under private initiative. . . . The value of and reward for such service can not be safely apportioned by the arbitrary decision of government agencies."

The world of scholarship was quick to detect this malign growth of officialdom—indeed men of learning and leaders of thought were the first to oppose it. Moreover they went to the cause of the disease—the morbid passion for legislation—and pointed out the elementary fact that law has its province and limitations as everything human must have; and that economic law, or any ordinance of nature, can not be repealed by statutory enactment.

Out of volumes of such exposition by persons pre-eminent in the academic field, consider these informing sentences from an address by one of the foremost legal authorities in the contemporary world, Dr. Roscoe Pound, dean of the law faculty of Harvard.

"To-day in the wake of ambitious social programs calling for more and more interference with every relation of life, dissatisfaction with law becomes universal. . . . The causes of non-enforcement of law . . . for the most part grow out of over-ambitious plans to regulate every phase of human action by law, they are involved in continual resort to law to supply deficiencies of other agencies of social control, they spring from attempts to govern by means of law things which in their nature, do not admit of objective treatment and external coercion."

MANY LAWS, MUCH INDIFFERENCE

There is the root of the evil, is it not?—the attempt to put all human activities into statutory strait-jackets—and these strait-jackets constructed, too, by those who know little or nothing of the industry or business they would thus encase.

We suffer from a plague of laws. Nobody knows the number of state and national laws and municipal ordinances that our legislative bodies have ground out; and it is impossible to keep track of the myriads of enactments and ordinances that pour from every law-making machine in America. We know only that there are hundreds of thousands of these products of the busy activity of our law-makers; and that the number of these statutory shall and shall-nots constantly increase.

For instance, within two weeks after the convening of the present Congress 6023 bills and 88 joint resolutions were introduced; and this proportion is maintained by most state legislatures. While, of course, comparatively few of these proposed laws are enacted, the aggregate of those that are crowded into our statute books, municipal, state and national, is stupendous.

Indeed, to grasp the extent and multiplicity of them is beyond the power of the human mind. The

most accomplished and best-informed lawyer in America does not and can not know the sum of even national legislation, to say nothing of the legal cascades that incessantly spout from our state legislatures and city councils; and there are thousands of statutes to get at the meaning of which requires careful study and delicate judgment.

Yet the citizen must observe every line of them. Is it not possible that here is one cause of that general indifference to law which is the most forbidding development of the times? May it not be that our excess of laws so harass the public that a mass psychology is produced impatient of all restraint and tolerant of those who overstep legal requirements? How else are we to account for the leniency of juries, popular sympathy with those accused of law-breaking and even sullen antagonism to courts?

Is it sufficient to attribute all this to the "after-effects of war"? Have we not overworked that explanation of law resentment? Did such resistance to law follow the awful four years of our terrible Civil War?—or of any other war we ever waged from the Revolution down to our war with Germany?

War taught millions of our young men discipline, order, respect for authority, obedience to directions and the absolute necessity of concerted action according to rules and regulations. Can it be that

the result of such schooling is the reverse of its natural effect?

On the contrary, was it not the habit, formed during the war, of unquestioning obedience to all kinds of government orders and exactions regardless of the legality, reasonableness or usefulness of them, that produced the terrorized submission by business men to similar bureaucratic demands in these days of peace and civil supremacy?

So is it not more just and accurate to lay to "the after-effects of war" only a part rather than all of our frame of mind as to law-observance; and to assign some portion of it to that mystification and perplexity of citizens which superfluity and complexity of legislation might naturally create?

Some time ago a well-known scientist called my attention to the aspect of the crowds on our streets—seldom a happy face or even a calm one, seldom a smile, seldom the sound of laughter, never an example of serenity, but instead strained and nervous countenances, furtive alertness, sullen apprehension and no gaiety at all.

He said that for a long time he had made note of this phenomenon in many cities and towns in widely separated parts of the country always with the same result.

Can it be that this melancholy state of the public

mind and feeling has to some extent been produced by excess legislation, which nobody understands but everybody must obey, and a vague fear inspired by over-government? Here is serious matter for our statesmen—the public temper is more important than particular statutes.

THE LIMITS OF LEGISLATION

But be that as it may, what caused the prodigious multiplication of laws which now cover the land like a tropic jungle? Was it not, perhaps, the result of wrong thinking? Did we not allow ourselves to become hypnotized by the false idea of government as an omnipotent and omniscient being which can do everything?—stop all evil, give all good, make everybody prosperous, happy and righteous.

Have we not come to regard government as a sort of mundane providence which ought to and can take the place of human nature, and direct all the activities of man more wisely and beneficently than human beings themselves can manage their affairs? If so, have we not been under a malign spell which we must throw off?—in an erroneous state of mind which we must correct?

At any rate, all of us will agree that we have too many laws and that some of them are too intricate and rigid for human uses—even for human compre-

hension. We can see, too, albeit vaguely no doubt, the limitations of law as defined by legal scholars.

The functions of the Church are of paramount value to the individual and community; and legislative halls can not take the place of pulpits nor statutes supplant sermons. Each has its appropriate field of action, and legislative invasion of the domain of religion is injurious to both.

For instance, several of the Ten Commandments have been, as they should have been, enacted into statutory law, as those forbidding theft, murder, perjury and the like; whereas other Commandments are beyond the sphere of human legislation as those forbidding covetousness and commanding love of God, honoring of parents and the like.

The Sermon on the Mount is a good illustration of supreme truths with which human legislation can not deal.

Also none of the laws of nature can be reversed by statutory enactments. We can, for a short time, modify the law of exchange, of prices, of supply and demand, of diminishing returns and the many economic laws which exist in and flow from the nature of things--but such experiments, all of which have been tried hundreds of times in the long course of human history, have, when pressed to extremes and long continued, always ended in disaster. We can

suppress initiative, shackle enterprise, discourage invention—but we thereby only slow down progress and diminish prosperity or destroy it altogether.

These simple and familiar illustrations make plain that we can not do everything by law. Even if all of us agreed that water ought to run up-hill instead of down-hill and Congress passed an act accordingly, the Mississippi would still flow to the Gulf and the Columbia to the Pacific. Yet we can dam streams, compound waters, harness Niagara and employ the forces of nature for the uses of man.

So we see the province—and the limitations—of man-made law. To determine the extent to which legislation is beneficial and beyond which it is hurtful, is the province of statesmanship. It is the application of common sense and sound judgment to immutable principles.

The science of government is to strike the balance, within the domain of government, between good and bad effects of legislation and administration and to adopt that which, on the whole, will best serve human needs.

Here, then, is the source of our excess legislation and the reason that so much of it is harmful. Perhaps the majority of us have known this all along, but our civic inertia and political indifference have kept us silent and inactive and thus permitted

minority groups to secure the enactment of unworkable or injurious statutes.

For the fact is that a comparatively small number of men and women, if sufficiently ardent, active and compact, can procure from Congress or legislatures, almost any law they demand. So comes that anomaly in a republic, of minority legislation affecting a whole people. Nor are these minority groups to be blamed—they are sincere, earnest and perfectly sure that their particular notion if put on the statute books and enforced will do the country a great deal of good.

If the Constitution stands in the way, let it be altered, say these honest, well-meaning but sometimes impatient champions of novel methods of human welfare. The nature and purpose of a constitution is of small account, in their eyes, compared with the immediate necessity of the plan they want adopted forthwith.

Thus we have been swept into an era of constitutional amendment comparable only to that in France during the period of the French Revolution—all of us remember the answer of a French bookseller when asked for a copy of the French Constitution, that "I do not deal in periodical literature."

Since the present session of Congress opened seventy-seven resolutions have been introduced pro-

posing additions to or modifications of the fundamental law of the Republic. Only a few of these are duplications. Some of them would overthrow the central idea of our distinctive American system of government.

THE REGIMENTATION OF BUSINESS

So much legislation as the quantity that burdens us could only have been produced hastily. It would have been a physical and mental impossibility for our legislative bodies to have thoroughly studied, in all relations, the subjects on which they have legislated so abundantly, considered maturely any of the multitude of laws passed or tested it by seasoned and informed discussion. Yet it is obvious, is it not, that such study, consideration and debate are indispensable to sound and helpful legislation?

Some time ago I made an attempt to examine acts of Congress and state legislatures passed within the last few years. The task could not be done within reasonable time—it would take years. But even piece-meal and superficial reading disclosed a jumble of laws wise and absurd, sound and fantastic.

Seemingly every fleeting public mood and emotion have been preserved by statute, like photographs of passing clouds and shadows. The mass of bizarre legalities found in state statute books reminds one

of the situation in Rome at the beginning of the breakdown of that mighty structure of law and administration when, to quote a great scholar, "the Roman praetor sought to make legal duties out of gratitude, out of reverence for parents and out of moral obligation."

But the outstanding feature of all legislation, state and national, which this cursory review revealed is economic restraint—government regulation of productive industry, government supervision of active trade, government interference with business. The idea of government as directing overlord of the industrial and commercial activities of the people is the dominant and dominating element of present-day legislation as shown by national and state enactments.

There are few if any states that do not have elaborate laws governing the conduct of business; and of course this is conspicuously true of acts of Congress as everybody knows. Any business concern—manufacturing, mercantile, insurance, transportation, agricultural or what not—that does country-wide transactions must submit not only to national regulation but also to regulation by as many states as it enters.

The thought that seems to have inspired these directive, coercive and repressive laws is that pro-

duction and exchange are inherently dishonest and that those who engage in these economic functions of civilized society will rob everybody else unless the Government prevents them. Or, to put the best face on such legislation, it can be explained only on the theory that to anticipate wrong-doing by some, all must be spied upon and checked in order to circumvent the misdeeds of the few.

Here is where bureaucracy comes in. These regulatory statutes do not merely define wrongs, prescribe penalties and leave prosecution to officers of justice informed by injured parties of law infraction, nor yet leave to courts and juries the trial of civil cases between litigants. Such statutes also create administrative machinery to operate their intricate provisions; and this, by a perfectly logical process, becomes an enforcing agency.

So every such law means a bureau, board or commission—and sometimes more than one such administrative and enforcing agency for a single law. And these contrivances mean a vast increase of laws; for the statutes creating them usually give them power to make rules and regulations of their own, to require reports, to impose exactions, to make interpretations of the laws they administer.

In practical effect all these bureaucratic outgivings have the force of law. The number of them is

unknown and probably never will be known. But taken altogether throughout the whole country, national, state and municipal, these bureaucratic ukases are well-nigh innumerable. They probably outnumber even the prodigious sum of enactments by Congress, state legislatures and city councils.

THE PLAGUE OF BUREAUS

So it comes down to this: We are largely governed by a bureaucracy. Bureaus investigate business, bureaus direct productive industry, bureaus prescribe commercial methods, bureaus require elaborate reports from all sorts of enterprises—in short government bureaus have become the commanding element in the economic life of the American people.

All this means a gigantic enlargement of the public pay-roll. The Civil Service Commission states that, at the present moment, there are 548,506 employees of the National Government and thinks that by June 30, 1924, the number will be 555,607. Yet in 1916 these federal employees totaled 438,057. The late figures do not include more than 50,000 other officials. To the whole must be added 157,362 employees who are not in the classified civil service.

The lowest estimate places the number of government employees, including those of all political subdivisions, at one out of every twenty adult persons.

Other studious computations recently made, fix a still higher proportion. The National Industrial Conference Board says that, all told, there are 3,400,000 in the public employ, municipal, state and national.

Every eleven workers over sixteen years of age supports one government employee. The aggregate salaries of this vast army of public servants is $3,800,000,000 annually.

Scores of thousands of these government employees are made necessary by the creation of government bureaus, boards and commissions. Some of these agencies of government, particularly those of states and cities, are frankly political—at least capable of being made and perhaps sometimes actually made parts of factional party machines. For instance, while running through the acts of various state legislatures, I came across a law authorizing a state director of oil inspection to employ as many local oil inspectors as he pleases and dismiss them when he likes.

But let that pass—perhaps it is inherent in human nature when functioning under democratic forms. The main point is the tremendous increase in bureaucratic arms of government, national, state and municipal, the corresponding multiplication of government agents and employees with the attendant

swelling of government expenses and, above all, the immense and ever-widening field of bureaucratic activities in the whole life and especially the economic life of the people.

Many consider the increase of bureaus, boards and commissions as the natural and desirable result of our complex civilization. Yet the historical fact is that the bureaucratic idea and practise was an offspring of autocracy. For example, bureaucracy was one of the many causes of the French Revolution. Under the *ancien régime* there were swarms and hosts of government officials and agents. There were even inspectors of cattle and inspectors of calves, inspectors of swine and inspectors of sucking pigs. In short, government intruded into every transaction of life.

Nobody could live except as the Government directed. And, since the Government made itself responsible for everything, it was blamed for everything. For the most part the French Revolution was the overthrow of special privilege and autocratic oppression, but it was also, to an appreciable extent, a protest against over-government. We see, then, that bureaucracy is not a modern development but, instead, the result of excessive centralization with negligent law-making and administration by proxy.

But regardless of the autocratic origin of bureaucracy, let us have more of it if it is good for us. We certainly have a great deal of it now. Washington is cluttered up with offices of government bureaus, boards and commissions. Some of them occupy whole buildings—one section of a single bureau, the Income Tax Unit, requires five large structures to house its thousands of employees.

All told, there are in the national capital several score of different bureaus, boards and commissions (it is difficult in the extreme to determine the exact number); and they deal with all kinds of subjects.

For example there is the National Screw Thread Commission, the Alaskan Commission, the Woman's Bureau, the Bureau of Efficiency, the Veteran's Bureau, the Bureau of Industrial Housing and Transportation, the Bureau of Foreign and Domestic Commerce, the Bureau of Home Economics, the Bureau of Education, the Federal Trade Commission, the Children's Bureau, the Bureau of Standards, the Bureau of Labor Statistics, the Board for Vocational Training, the Federal Power Commission, the Federal Labor Board located in Chicago, and a large number of other agencies of the National Government. Those named are but a few and the least important.

Taken together state and city bureaus, boards

and commissions are, of course, far more numerous. Indeed some states have shown greater bureaucratic fecundity than the National Government itself.

All these bureaus, boards and commissions do some good, several are indispensable and there is not one that can not show plausible excuse for continuing it and giving it more money and power. But if a thousand new bureaus, boards and commissions were created to-morrow, each of them would also give service of some value, and, after a year or two, could and would present swarms of reasons why we could not get along without them.

This fact shows in striking fashion, does it not, that there is a limit to the manufacture of government bureaus? If so, have we not reached that limit? Have we not passed it, indeed? If we keep on producing bureaus—which seems to have been our favorite pastime for several years—will anything worth while be left to individual initiative, energy and enterprise? Will not everything of account be controlled, regulated and directed by government? And is that good for us as individuals or as a nation?

SELF-REGULATION

As a matter of every-day living, would it not be better to leave most economic and social regulation

to voluntary organizations of citizens?—that is, so far as the ordinary conduct of business and maintenance of ethical standards are concerned. For example, almost every branch of business has such an association, both national and state—grocers and druggists, builders and supply men, farmers and bankers, laborers and physicians, hardware dealers and potters, merchants, lawyers and manufacturers of various kinds and so on throughout the hundreds of specialized activities of our infinitely complex and diversified yet interwoven and interdependent industrial, commercial and social system.

Meetings of each of these bodies are held every year and are attended by hundreds of members from all over the country. Subjects of interest are formally discussed with fullness of knowledge enriched by up-to-date practical experience and with marked ability. Resolutions are agreed to expressive of the latest opinion on improved methods and requirements which become standards of conduct to be observed by everybody doing business in that particular line.

Outsiders present at these gatherings are mostly impressed by the high sense of business morality that inspires the discussion of business problems and by the spirit of public service that animates the proceedings. It is plain that these men and women

are intent on promoting the prosperity of all the people as well as advancing their own material interests.

Here is the normal and wholesome regulative force, is it not, of American industry and trade?—flexible, informed, progressive, efficient. It is vital, not mechanical; a natural growth, not an artificial makeshift. It is self-regulation, indeed a form of self-government and by men and women who know what they are about—men and women who are good citizens too, devoted to the upbuilding of America of which their special line of business actively is a part.

Aside from the influence of business ethics which controls them, it is to their interest to root out scoundrels and scoundrelism from their section of the American business world. And they do—the dishonest lose caste among them and are given the cold shoulder. In actual results, about the worst thing that can happen to one of them is to get his associates down on him for immoral or dishonest business practises.

Yet the whole bureaucratic theory ignores this beneficent and powerful force in our economic life. So, as is inevitable, all these voluntary organizations of American men and women engaged in every form of industry and trade are opposed to government

control of and meddling with their business. That they should object is inherent in the nature of things; but also they are prodded to resistance by government agents, inspectors and officials who continually try to make them toe the mark chalked out by bureaucrats who know little about business, acting under statutes passed in disregard or ignorance of economic law or indispensable business custom.

As a practical matter it is probably out of the question to abolish any of the national bureaus, boards and commissions we now have—each has its group of ardent champions whose loud and passionate protests against the demolition of their favorite, Congress would be likely to heed. Also it is only human nature that hostile action against any one bureau would bring to its defense the combined forces of all other bureaus—a power, a very great power, which few politicians would oppose.

But we can stop creating more bureaus, boards and commissions. We can check the lust for larger power and wider authority which these bureaucratic bodies constantly make and which it is in the very nature of bureaucracy to make. We can simplify their functions and, perhaps, even reduce the more harmful meddlesomeness of a few of them.

EBB AND FLOW

Of course the inherent defects of some of these bureaus may work the disintegration of them or at least lessen their activities. For instance in the annual reports of several of them, sharp complaint is repeatedly made that enough competent employees can not be secured; that new employees must be educated and trained; that as soon as they are thus equipped and acquire experience, they quit government service for private positions which pay better salaries; and that the resulting turnover of bureau personnel impairs bureau efficiency and diminishes bureau power.

So bad was the situation that a Bureau of Efficiency was created to speed up, coördinate and generally look after bureaucratic performances in Washington. The Senate asked its advice about establishing schools for government employees. In compliance the Efficiency chief officially reported that of the 11,253 employees in the War Risk Insurance Bureau in 1920, which he says "are typical of the whole service," nearly one-third had never attended high school, a little over one-half had got no further than high school, only eight per cent. had gone through college and two per cent. had actually not even completed the common-school course.

Out of 100,000 such government employees in Washington this official report states that 11,797 "declared their intention of enrolling" as students in government schools for government employees, if such schools were started. And started they must be, argues the report, because "it is impossible at present to secure in Washington, or, indeed, anywhere in the country, instruction which would be of direct assistance to government employees in the performance of their duties."

Constant change of personnel takes place, thousands of resignations occurring every year; and the average cost of securing a new employee and training him to do his work as well as the old one is $50. Laments of these turnovers come, for the most part, from the very government agencies whose particular province is the regimentation of productive industry and business in general.

For instance, the annual reports of the Commissioner of Internal Revenue repeatedly complain of "the serious problem of recruitment and training" of Income Tax Unit employees. Very few field agents, he says in 1919, thoroughly understood the "complex provisions of the law" and had to be brought to Washington for "intensive courses of instructions." The stream of resignations rose so high that in 1922 "a total of 1150 new appoint-

ments were made compared with 1087 separations."

The report for last year states that "few men of the type desired are attracted by the salaries" and that the better equipped resign upon "offers of more lucrative employment from business organizations." So the Bureau is making desperate efforts to educate employees by means of "voluntary schools within the department."

Yet this force administers our income tax laws, the most intricate fiscal legislation ever enacted. They audit millions of extensive and complicated reports, examine books, records and papers of business concerns all over the country, pass upon depreciation of plants, goods, material, and business methods everywhere.

A distracting and well-nigh incomprehensible mass of rules, regulations and interpretations are constantly piling up. Thousands of these are unpublished and often conflict with those that are published. Yet in some way or another, all must be enforced by the thousands of officers, agents and employees of the Bureau. And all is done, in, to or from Washington notwithstanding the enormous extent of the country and the infinite variety of American business.

Of course this bureau is necessary to the operation

of the income tax law and must not be weakened. Mention of the condition of the force as reported by the commissioner is made only as an illustration of the difficulty of running even the most indispensable government bureau. Naturally the same is true of bureaus, boards and commissions which, perhaps, are not so essential.

OUR INDUSTRIAL OVERSEER

Thus a like condition is found in other government regulative agencies of business and industry. Take, for instance, this informing statement from the annual report of the Federal Trade Commission for 1922:

"The Commission is still seriously affected by the constantly occurring turnover in its force. The attraction of the outside business world with the higher salaries obtainable therein for the same character of work, has caused the Commission to lose a large number of employees."

When this Commission was only two years old "several members of its staff resigned to accept work with private corporations."

The trouble is, explains the Commission in 1919, that "many of our employees are attracted by opportunities in the business world, both in the matter

of positions and salaries which the Commission can not afford to pay them." Two years later its special examiners were so few that the Commission "could not handle many large investigations concurrently and at the same time take care of its current work."

The extent and variety of these labors is thus indicated in the report for 1923: "The work of the Commission covered the entire scope of the trust problem and related subjects. It reached from the simplest forms of unfair competition on through all phases of the more complex question of trust dissolution. These activities touched the whole range of Commerce."

A fairly large order, is it not? Yet the law creating this overseer and disciplinarian of American economic life seems to give it well-nigh unlimited snooping authority. For instance, the Commission is empowered to prevent "unfair methods of competition" whenever it thinks "the interest of the public" requires interference by the Government.

Whether any business custom or method is "unfair" is made solely a matter of the "opinion" of commissioners who refuse to define that term; so that, in practical effect, the immeasurably vast and infinitely complex and delicate economic system of America is at the mercy of five excellent gentlemen in a Washington bureau.

And think of this all inclusive and well-nigh autocratic power: When a President "requests," the Commission must "investigate and report the facts relating to any alleged violation of the anti-trust acts by any corporation." It does not take a lawyer to see what a President could do to most industrial organizations under this sweeping provision.

He could, by intolerable "investigations," punish any business concern that had incurred his displeasure; indeed, if so minded, he could terrify the business world into his political support, or at least into political stupefaction and desuetude. It may come to that—nay it is as certain as sunset that it will come to that some day, if this bureaucratic omnipotence is not bridled.

Moreover the Commission must make investigations whenever Congress directs. Here is an ideal method of "passing the buck" as the popular saying goes. A member of Congress wants something "investigated," general consent is given because other members are fearful of being pilloried as defenders of bad practises; but all want a bureau to do it—they really have no time themselves. Good! The Federal Trade Commission is at hand already armed with full powers for just that sort of thing.

This particular bureau has been very active in imposing upon business concerns its notions of right

business methods. But the courts have frequently negatived the Commission's orders which led the Commission, in its latest report, to complain that the Supreme Court, "in defining the term 'unfair methods of competition,' stated that it was clearly inapplicable to practises never heretofore regarded as opposed to good morals or against public policy, and thereby tended to restrict the jurisdiction of the Commission to precedents established under common law and judicial decisions"; that the "ready development of the law of business practises under the Commission's rulings" has thus been retarded; and that the Court requires strictness in the Commission's procedure "comparable to that governing a criminal indictment."

Seemingly the Commission is out of humor with the Supreme Court. But what would you? Is there, then, to be no certainty as to legal methods? Are business men to be denied the privilege of knowing what they can and can not do under the law? Is productive industry to be chilled by fear that even long accepted and approved methods of production and exchange, always considered both moral and legal, are likely to be banned by a government bureau in Washington? The Commission thinks so, it would seem, in view of its resentment of Supreme Court decisions.

While Congress was in the power-giving mood it "gave a plenty" as witness this letter of marque and reprisal authorizing the Commission to do what it pleases on the high seas of American domestic industry, commerce, and trade:

"The Commission shall also have power to gather information concerning, and to investigate from time to time the organization, business, conduct, practises and management of any corporation engaged in commerce, excepting banks and common carriers . . . and its relations to other corporations and to individuals, associations and partnerships."

Also the Commission "by general or special orders" can require all corporations or any one of them to make annual or special reports in writing and under oath; it can "investigate" the execution of court decrees; it can classify corporations; it can examine all books and papers of any business organization and compel testimony by witnesses who may be fined and imprisoned if they refuse to assist this economic inquisition; worst of all—and this is typical of the whole bureaucratic system—the Federal Trade Commission can "make rules and regulations for the purpose of carrying out the provisions" of the law creating the Commission.

These are only illustrations of the powers of this one Washington bureau.

As was to have been expected since the same is true of every bureaucratic body ever created, the Commission construes its powers as broadly as possible. It says that its duties "involve both legal and economic aspects of trade problems." The reason for not telling the business world what constitutes "unfair competition" is that the principle is "sufficiently elastic to cover all future unconscionable competitive practises in whatever form they may appear, provided they sufficiently affect the public interest."

Because its proceedings against business concerns are "primarily for the purpose of protecting the public interest . . . and not contests between individuals" and because the Commission "may institute proceedings on its own motion," it will not inform those accused who their accusers are. It sometimes feels that a particular case involves such large questions as to "demand specific investigation of conditions in the country as a whole."

There you are! Broad enough, one would think—yet the Commission hopefully avows that its work "is capable of expansion." So later on, it "intervened to *prevent suspected* projects" which, if real and carried out, would, in the opinion of the Commission, have violated the Clayton Act.

Small wonder that the Commission soon found its

task "almost overwhelming" since it says that in a single branch of its domestic labors, that of preventing unfair competition, its "work touches every phase of trade." Nevertheless Congress actually extended its powers to foreign countries—it must now prevent American exporters from "unfair competition toward each other" when selling American products abroad.

In large numbers of cases actually tried, the complaints are found to be without merit and "the whole matter is dismissed"—but meanwhile the business man thus acquitted of violation of business law, ethics or morals even as understood by the Commission, has been put to expense, worry, interruption of his affairs and branded in the newspapers as a lawbreaker.

For when the Federal Trade Commission makes formal public complaint of a business firm or company, the public is widely informed of the accusation but acquittal is sparingly published if at all. The loss thus caused—impairment of good name, disorganization of business, distraction of mind from business duties, least of all attorneys' fees and traveling charges—is beyond computation.

Last year the work of the Commission was gigantic—it was called upon, it says "to handle 2273 separate legal matters in domestic and foreign com-

merce," disposed of 1352 of them, leaving 921 unsettled "by reason of inadequacy of funds." We are again reminded that the way to reach the Commission is by "a letter from the general public through an individual or corporation" telling of "some alleged illegal or harmful practise in foreign or domestic commerce."

During the year ending June 30, 1923, "1169 separate requests from the public" of this kind were received; and 144 complaints were issued "directed to 2384 separate respondents and involved a wide range of products and industries." In view of the unsound practises, general ignorance and downright villainies of our business men thus disclosed or suspected, it is well-nigh incredible that American business functioned at all or was even tolerated before the creation of the Federal Trade Commission in 1914.

It has, of course, done some good things, albeit every one of them could either have been handled by the courts or the correction of the evil would have inevitably resulted from the normal operation of economic law and natural business forces. But, on the whole, has this widespread and incessant though fragmentary and spasmodic interference with American industry and trade strengthened or weakened American business and advanced the well-being of the people as a whole?

MOUNTAINS OF MAIL

The entire bureaucratic field can not be covered in a single chapter or in many of them, but let me suggest one more item—that of the tremendous burdens which these Washington bureaus place upon our mail service. For instance in 1921 the Bureau of Foreign and Domestic Commerce wrote 170,000 letters in this country alone, distributed 20,000 individual copies of commerce reports, sent 100,000 confidential circulars, 420,000 copies of selling letters and 576,000 copies of trade lists.

During the first full year of its existence the Federal Trade Commission sent business questionnaires to 289,460 individuals, firms and corporations and, when answers were not sufficiently elaborate and explicit, mailed thousands of "follow up" letters. Millions of letters, forms and documents are sent through the mails every year by the Bureau of Internal Revenue alone.

This is but a tiny part of the prodigious volume of matter sent out by Washington bureaus—the quantity of printed material is almost beyond estimate. A list of the reports, studies, brochures, etc., would fill many pages. All are carried by the Government free of charge, the cost being borne by American taxpayers.

When we think of the big annual deficit of the Post Office Department, let us also think of the train loads of matter sent over the land by the many boards, bureaus and commissions functioning in true bureaucratic fashion at the nation's capital.

The items above given, huge as they are, are trifling contrasted with the stupendous magnitude of the total bureaucratic output. Moreover, mind you, all this—letters, forms, circulars, pamphlets, documents, books, etc., many of them huge volumes —are printed by the Government at government expense. It is doubtful whether any book publishing house in the world prints so many pages as does our government printing office in turning out this bureau material.

Perhaps it is all worth the money it costs American taxpayers—provided these bureau publications are widely read. But are they? It would be interesting to know how many members of Congress, even, have read so much as the annual reports of every Washington bureau?—or any of them? Yet these annual reports are scarcely foot hills to the mountains of literature produced by these bureaus and printed at public cost.

But to return to the bureaucratic drill-mastering of American business; all of us will, of course, agree that if the industrial and commercial activities of the people are to be supervised and directed by the Government, such regimentation should be by persons as competent as those who manage the myriads of concerns all over the country thus subjected to government orders and control. That is obvious, is it not?

Very well! Speaking by and large, American business men are resourceful, energetic, enterprising—and honor is the very foundation of our whole business system. It sometimes is said that, since ours is preëminently the age of business, our strongest and most ambitious men are devoted to industry and trade. This is, of course, an overstatement but there is some truth in it.

Certainly the inconceivably vast and multifarious business transactions which take place every day all over America are conducted by men of much intelligence, great industry, wide experience, and for the most part, a high sense of morals. Moreover, business advance, like all other forms of progress, requires constant experiment, the trying out of new methods, incessant readjustment, the devising of

simpler processes. That is the formula of improvement.

So initiative, courage, judgment, invention, foresight, persistence and all the well-known business virtues must have as free play as possible. To try to standardize them is as wrong as it is futile. It is this liberty of thought and procedure which largely——very largely—has brought about the miraculous economic development of the United States and caused the amazing and unprecedented success of American business.

Even if the principle of bureaucratic control of industry and trade were as right as it is wrong—it is the principle of paralysis utterly hostile to progress and freedom—still the benefit of its application to active business would depend, would it not, on those who administer the bureaucratic system? Should they not be at least the equals in business experience, knowledge and ability, of those whom they discipline? But are they? Can they be?

The official reports already quoted answer that question, do they not? Or freshen your mind by these additional facts:

Since its creation over eight years ago, 2112 original appointees were made in the Federal Trade Commission service and it had but 308 employees on June 30, 1923. Of these 129 are not under the Civil

Service and include attorneys, special examiners, economists, etc., whose salaries average less than $2500. This is the force which in this bureau does the actual work of supervising American business as above described.

What has been said, applies in greater or lesser degree to most administrative and enforcing agencies of government, city, state and national. Is it not unreasonable—even absurd—to expect good results from restraining, regulating and directing the most capable men in the country by such bureau agents and employees as can be had at meager government salaries?

This question is on the assumption that the principle of bureaucratic government is sound and consistent with republican institutions, which it is not.

At the very best, meddlesome interference with the natural process of industry and trade is, as yet, an experiment among free people. All will agree to that fact. Very well! If continued, should it not at least be made with care and moderation?

After all it is a kind of government competition with private enterprise, is it not, in the sense of a matching of the bureaucratic mind stiffened and formalized by routine, with the business mind made inventive and flexible by necessity?

But should it be continued? Is it a good thing

to compress private initiative within forms prescribed by government bureaus? Will better results to all the people be secured by placing in bureaucratic strait-jackets the intellect and energy of the millions engaged in the private management of production and exchange?

Republic or bureaucracy—in those three words is the issue and our choice.

V

MR. PRESIDENT

Our General Manager: Conventions and Availability: the Two-Thirds Rule: Duties and the Day's Work: Foresight and Courage: Judicial and Ambassadorial Appointments: the Cabinet and Power of Removal: Always He Must Decide.

When applied to the head of the American nation, that is the highest official title known to man. In no other country does a chief executive have such intimate relationships with his people. In no other government does any one man wield such powers as does the President of the United States.

His authority and potentialities are both constitutional and extra constitutional—that is, within and beyond the Constitution. In short, like other organs of our Government, the Presidency has been a growth corresponding to the development of American life.

Those who think of our fundamental law as a rigid mechanical contrivance have not, perhaps, made note of the changes that have taken place in our Constitution. These are many and, in some cases, startling.

THE METHOD OF SELECTION

For instance, the method of selecting our Presidents is, except in meaningless form, the opposite of that provided by our charter of nationality—certainly the reverse of that intended by "the Fathers." In this respect, indeed, something like a constitutional revolution has occurred.

Our fundamental law does not contemplate the existence of political parties—indeed it was drawn on the non-party theory, as witness two Houses of Congress and a President which may be and often have been controlled by opposing political parties, the result being a situation I shall presently examine.

In the Constitutional Convention there was great confusion as to the manner of choosing the President. At first it was thought best for Congress to select the Chief Magistrate. Then it was proposed that governors of states should elect him.

Finally Hamilton suggested the plan of presidential electors. There was great uncertainty, too, about the length of his term of office, about his re-eligibility, about his title, about everything concerning the Presidency.

At last the Constitution was fixed as it is except as to the Vice-Presidency, which brought the Twelfth Amendment, a change for the worse. It

provides that each state shall choose electors who shall meet in their respective states, ballot for President and Vice-President, and send the result to the President of the Senate at Washington where all such returns must be opened and counted before a joint meeting of both Houses; and if nobody has a majority, the House of Representatives shall choose a President from the three highest on the list, the vote to be by states "the representation from each state having one vote" and "a majority of all the states shall be necessary to a choice."

Two Presidents, Thomas Jefferson and John Quincy Adams, have been thus chosen by the House of Representatives.

The idea was that these presidential electors should meet, look over the field and select for President the very best man in the country—the ablest, most experienced and in short the outstanding statesman of his day. "The most exalted characters can only be known throughout the whole Union," as James McHenry of Maryland well, albeit infelicitously, expressed the idea of our Constitution-makers as to the kind of man which the constitutional electoral colleges were intended and expected to make President.

These electors, it was supposed, would, of course, themselves be the most capable, far-seeing and

trustworthy men to be found in their respective states; they were to act with the utmost independence and deliberation, be public trustees as it were; and to their patriotic and disinterested judgment was to be left the august responsibility of choosing the Chief Executive of the nation.

That plan went to smash as soon as political parties appeared, which was almost immediately after our government was established. Forty years later the Convention system developed, and, presidential electors pledged to vote for the party candidate, were made a part of the party ticket in each state—as we shall see, party conventions did not exist until 1831–2.

So it has come about that, to-day these constitutional functionaries—presidential electors—are no more than party registering devices without judgment, will or power, instead of being as the Constitution intended, the picked elders of the land endowed with the noble authority to use their maturest thought, in council and after careful consideration, in finding and naming a President of the United States.

This fundamental change also illustrates the difference between constitutional and institutional functions. The method of automatic and predetermined voting by presidential electors is so firmly established as to be an institution. An even better

illustration is our practise of electing representatives in Congress only from districts in which they live—this is not required by our Constitution which permits us to choose our members of the Lower House regardless of their district residences as, indeed, has been done a few times in our history.

But the custom of requiring our "congressmen" to live in the districts they represent has become so fixed and universal that it is an American institution, the exact reverse of the Canadian or English system by which a member of Parliament may be chosen from any constituency.

Before the Twelfth Amendment was enacted the Vice-President was the man who received the second highest number of electoral votes for President, and therefore a personage deemed worthy of that exalted office. The Twelfth Amendment requires presidential electors to vote for a Vice-President as such, in the same manner that they vote for a President as such, a distinct decline since, obviously, the electors would not consider so highly the man who probably never would be President. But, as we have seen, the whole scheme is now no longer operative.

PARTY CONVENTIONS

The method of nominating presidential candidates by national party conventions is another institu-

tional development not harmonious with the constitutional plan. The same is true of the presidential primary and was the case with the old-time party caucus.

After Jefferson's first term and until 1831–2, presidential "tickets" were, generally speaking, named by Congressional caucuses. Members of Congress belonging to each political party, met in caucus and named the party's presidential candidates. It was an excellent method if the constitutional plan were to be abandoned as it had been, and if party voters were to have no hand in selecting party candidates, which they did not.

Largely for this reason, the party convention was devised to bring party control nearer to the party rank and file. It was bitterly opposed and denounced by the old-timers of that day as degrading, debasing and, in general, "popularizing" party nominations.

Webster and Calhoun, for instance, strenuously opposed party conventions on those grounds. They and men like them were for the old caucus system of picking and naming party candidates. No convention for them! –it gave the rag-tag and bob-tail too much voice in party management to suit those great statesmen.

Still the convention system worked fairly well until

after the Civil War, although by means of it and the use of the weapon of "availability" the politicians were, with one or two notable exceptions, able to prevent the nomination of the best men and secure that of innocuous mediocrities. "Who," asks the late Lord Bryce, in his *American Commonwealth*, "now knows or cares to know anything about the personality of James K. Polk or Franklin Pierce?"

For the same reasons that the caucus gave way to the convention, plus the additional reason of corrupt boss control and manipulation, the primary is overturning the convention. Caucus, convention, primary—each is a logical and inevitable step toward the control of political parties by party voters. Good or bad, it is an evolution of popular government.

The arguments against the primary and for the convention which we hear to-day are, for the most part, identical with those made from 1830 to 1840 against the convention and for the caucus. There are, of course, the additional arguments of great expense to primary candidates, frequency of campaigns and the like—to which arguments advocates of the primary make answer that no candidate in a primary need spend much money, none at all if he does not want to; that vast sums were spent under the convention system and often corruptly and

always secretly spent; and that primary campaigns are excellent tryouts of candidates as well as a good preparation for election campaigns—the public, they say, can not have too much information.

As a sheer matter of selecting the fittest man to be President, all these non-constitutional methods—caucus, convention or primary—are incalculably inferior to the constitutional plan and theory of choosing a President by electors as described. Heretofore we have got along with many weak and narrow-visioned men as Presidents largely because of free land and undeveloped resources.

As yet we really have not been hard put to it by desperate economic pressure, such as that which bears so heavily on densely peopled countries with limited natural wealth; but the time draws near when the well-being of the people will require the very ablest man in America as our general manager, which, in the process of our civic evolution, is what the American President is coming to be in practical effect and, broadly speaking, ought to be, perhaps.

In the making of nominations by party conventions, sometimes small account is taken of the fitness of the campaign standard bearer to be Chief Executive of the nation, and hardly any at all of that of his running mate. This fact is vital, not

only as negativing the Constitution, but also as affecting the well-being of the people.

AVAILABILITY AND MEDIOCRITY

Party politicians want to win and so "availability" is, in their eyes, a well-nigh sacred formula. Often in our history they have waved this magic wand over conventions, which thereupon rejected our ablest statesmen and chose instead an amiable person without antagonisms—a good thing for campaign purposes, perhaps, but a bad thing for the United States in case the pallid and inoffensive candidate is elected.

Thus Henry Clay was defeated in the Convention of 1839 and Harrison nominated. The reason Clay was not available at that particular moment was that he was a Mason, against which order there was then a curious fanatical uprising. Clay failed again in 1848 because a "war hero" was then wanted and Taylor was nominated by the Whigs, a man so absurdly unfit that Webster refused to support him.

Blaine was defeated at Cincinnati in 1876 and Hayes nominated, which led the then popular idol to bewail his fate as being the Henry Clay of his party. Indeed "availability" has been responsible for most of our second-rate presidential candidates. As the ablest and most accurate foreign commentator

on our institutions and political methods, the late Lord Bryce, declares of us: "To a party it is more important that its nominee should be a good candidate than that he should turn out a good President."

But the time is coming, if indeed it is not already here, when the prosperity and happiness of the American people forbid the election of weak men merely because they are not offensive to anybody, and therefore "available."

We dislike foreign criticisms, yet we must admit that there is a trace of truth in the reference of the notable English scholar, the late Professor A. V. Dicey, to "the utter insignificance of many American Presidents." Lord Bryce is particularly severe on us for our selection of so many small men as Chiefs of the Republic, going to such an extreme as to say that from Madison to the close of the last century "no President except Abraham Lincoln displayed rare gifts or striking qualities in the chair."

Unluckily for both Webster and Clay, the convention system came in just as these men were in the fullness of their wonderful powers, when their presidential ambitions were strongest. So "availability" killed them off and incubated lesser men. Webster never was so much as nominated, and Clay only when he could not possibly win, a fact which he recognized and bitterly resented.

Space does not permit the narration of the frequent grotesqueries of party conventions, amusing and whimsical as many of them have been; but a few may be given as illustrations. For instance, take the Democratic Convention of 1844, which nominated the first "dark horse," James K. Polk. There the fantastic "two-thirds rule" prevented the selection of Martin Van Buren favored by an ample majority of the delegates and the undoubted choice of his party.

Van Buren was a very able man, too, widely experienced in and thoroughly familiar with public affairs. But another man of signal ability and fine record, Lewis Cass, was a candidate and by the two-thirds folly, was able to keep his rival out of the nomination.

So, of course, at the right moment during the deadlock, up rose a delegate who announced himself the "apostle of harmony" and presented the name of that "noble patriot and glorious statesman" James K. Polk, who had the supreme merits of inoffensiveness and of not having stood for or against anything in particular.

However, as one delegate exclaimed in the course of an impassioned speech, Polk was at least "a pure and whole-hogged Democrat," which remark brought forth "tremendous cheering." Thereupon, since the

fate of the nation demanded Democratic "harmony," a stampede began and Polk was made Democratic standard bearer. There was not the least bit of sense in the whole proceeding as far as the people's interest was concerned.

At this time began that curious type of extravagant, emotional speech, convention "oratory," which is one of the most diverting features of party conventions. While nearly always tawdry rhetoric, these speeches sometimes rise to heights approaching real eloquence although of the rhythmical and old-fashioned camp-meeting kind, as, for example, Ingersoll's "Plumed Knight" apostrophe placing Blaine in nomination at Cincinnati or Bryan's "Cross of Gold" plea for free silver at Chicago.

THE TWO-THIRDS RULE

While we are on the subject, perhaps a word is permissible about the bizarre two-thirds rule governing Democratic national conventions. This was one of the party edicts of Andrew Jackson. He told his party to adopt it in the Democratic Convention of 1832, the first real party convention ever held, by the way, unless we can so call the anti-Masonic gathering at Philadelphia in 1830 which nominated William Wirt or that of the National Republicans which nominated Clay at Baltimore in 1831.

Jackson was the unanimous and undisputed choice of his party. But he was its autocrat, too, and he wanted for his running mate, Van Buren, who was then not very popular. The delegates simply did not dare disobey Jackson's orders who, none the less, wished his every act to appear to be merely the will of the people, his every word merely "the voice of the people," as, indeed, he actually thought it was.

So if Van Buren were nominated by two-thirds of the convention, nobody could say that he had been forced on the ticket. Thus was adopted the celebrated resolution which, from that day to this, has vexed and sometimes disrupted the Democratic party "that two-thirds of the whole number of the votes in the convention shall be necessary to constitute a choice."

As nearly as the historian has been able to determine, such was the trivial motive from which the two-thirds rule originated. After Jackson's day, strong men of the party often have tried to abolish it, but always have been thwarted by minority politicians and factional bosses.

The two-thirds rule is a minority sword wielded by the guardian angel of mediocrity. It has produced diminutive candidates in the past and will in the future. This is inevitable in the nature of the case—except by accident it can not be otherwise.

Elections, too, have, now and then, been as emotional and unintelligent as conventions. A peak illustration of such senseless popular tides of sentiment was the presidential campaign of 1840 when Harrison and Tyler were swept into office. An unlucky Baltimore Democratic editor said that if Harrison were given two thousand dollars a year, a log cabin and a barrel of hard cider he would be content.

That settled it. The Whigs had no platform, no principles, no policy. But never mind! So much the better! So log cabins were built everywhere, oceans of hard cider consumed, and because log cabins suggested coonskins, these were nailed to doors and walls of campaign log cabins. Cheap cartoons of Harrison sitting outside such an abode of the common people, drinking out of a gourd hard cider from a barrel near by, were scattered everywhere.

A banal song took the place of argument—"Tippecanoe and Tyler too . . . Little Van's a used up man." Thus was the country saved in the fifth decade of the Republic; and from that day to this a well-known type of politician with presidential aspirations has been careful to be born in a log cabin.

A chance sneer, "Who is James K. Polk?" added thousands to his certain majority; and when he was inaugurated this ill-fated question, which had be-

come a sort of campaign battle cry, was shouted by the victorious Democratic thousands who paraded in triumph the muddy streets of Washington. "Who is James K. Polk," indeed! They had shown the scoffers. And of course all remember the Burchard speech which many blamed for the defeat of Blaine and the election of Cleveland.

REPRESENTATIVE OF ALL THE PEOPLE

What now, of the powers, duties and tasks of our Chief Magistrate selected by the non-constitutional and haphazard methods described? In the first place let us have clearly and firmly in mind that our President is the representative of the whole American people, as a people. The fact that everybody votes for President while only small divisions of men and women vote for senators and still smaller divisions vote for representatives, gives the President a nation-wide relationship and influence possessed by no other official or by Congress itself.

So we look to the President for everything and blame him for everything. Moreover, by reason of the non-constitutional party development already noted and the extra-constitutional presidential party leadership presently to be noted, citizens make no distinction between Congress and the President when both belong to the same political party.

Thus in elections the President goes down if his party in Congress has offended the people and the same reaction happens against his party's majority in Congress when the President has displeased the country—"the tail goes with the hide," in either case.

"OVERWORKED" PRESIDENTS

Before we go into the matter of presidential authority and influence, it may be helpful to examine the complaint that the President is overworked. That is not so. Worry may wear him out, responsibility crush him, but mere labor does not hurt him—at least none that he really has to do.

For instance, the foolish custom of meeting, shaking hands with and saying "just a word" to everybody that happens to be in Washington could readily be dispensed with; and a prodigious majority of the people would be glad if that practise were dropped. The origin of it is interesting, but not important. It is enough to say that we have outgrown it.

It takes time and energy that belong to the nation. Nothing comes of it, except the satisfaction of the visitor's curiosity on the one hand and on the other hand the reputation for presidential "accessibility" and "kindliness" which by some is

considered a political asset. But that sort of thing does not help the country.

Of course our President should not shut himself off from the people—far from it. On the contrary he should keep himself as close to them and them to him as is humanly possible. For he is their leader, their spokesman, at once the interpreter of their will and the guide of their opinion, their friend and champion, the protector and defender of their interests.

But this close contact with the people could be achieved much better by short trips over the country every once in a while—say three or four times a year—and longer ones at greater intervals. The President could get to the grass roots in that way—not formal state journeys with prepared speeches but casual and neighborly visits here and there among the farms, shops and homes of the people, punctuated with familiar, offhand, unwritten short talks—the shorter the better.

Also our Presidents spend a vast amount of time talking with senators and representatives and other politicians about the numerous minor appointments that must be made.

"I can not exaggerate," testifies Chief Justice Taft as to what happened when he was President, "the waste of the President's time and the consumption

of his nervous vitality involved in listening to congressmen's intercessions as to local appointments."

Nine-tenths of this is unnecessary. If, at the outset, the President would make it clear that he would appoint (except judges and ambassadors) those recommended but hold responsible—and mean it, do it—the senator or representative urging the appointment, most of the patronage burden would be lifted from the presidential shoulders.

But the President should not depend on such recommendations as to appointments of justices of the Supreme Court, federal judges, or ambassadors. These he should appoint on his own personal and official responsibility.

Here again the theory and intent of the Constitution has undergone a radical change. Members of Congress have no legal authority whatever to recommend appointments; indeed great pains were taken to keep this executive function out of the hands of legislators.

But practical necessity and party considerations long since established the custom of patronage distribution as now exercised; and it is not likely to be abandoned—certainly not so long as "party government" continues. President Taft urged Congress to pass a bill providing for official promotions on merit which was right, wise and would have greatly

relieved the President of the intolerable burden described. But Congress would not pass it.

Then there is the signing of commissions, sheer mechanical drudgery that takes many hours each week. Speaking from his experience as President, Mr. Taft says that this "is the greatest manual duty the President has to perform" and that "a substantial part of each business day is occupied with signatures." Surely the head of the nation ought not do that clerical labor.

He probably could get out of it by asking Congress to provide some modern method. The constitutional language that the President "shall commission all officers of the United States" does not require him to sign manuscript certificates of appointments, or if it does, it should be modified as necessity has forced other constitutional alterations. No amendment to the Constitution is necessary to accomplish this obvious need.

Such things constitute by far the greater part of "the pace that kills" which some Presidents think they must keep up, but need not. Talks with local political leaders an American President must still have since, as the head of his party, he needs to know the state of his party organization. But such consultations require little time, for the politician is usually a sensible person and very practical.

Long-winded political "conferences" are a waste of time and strength, and the length of them often is more the fault of the President than of the politicians —let us "give the devil his due."

DECISION

So we come down to the real work that the President must do. Chiefly this is the mighty labor of decision, which is the burden and also the allurement of the Presidency.

Take the formulation of policies. As all of us know, issues are not made but grow out of ever-changing conditions. A situation thus arises, to deal with which several courses are possible. It is for the President to decide which is best and then formulate—that is, state—that policy in simple and convincing terms.

To do all this requires knowledge first of all, and then judgment. As to the necessary information, the President is fortunate. A senator or representative must himself dig out the facts of any given question, unless he happens to be a rich man, in which case he can employ experts to do his research work for him. Even this is risky; and, of course, the legislator who relies on ex-parte data furnished by interested persons is skating on very thin ice—

very thin ice indeed, and over deep and dangerous waters.

The President, on the other hand, has at his instant command not only all the resources of the Government, but of the whole country also. He can order to the White House at any hour the man in any department who knows most about the subject in hand and say to him: "By to-morrow night I want the outstanding facts of this matter stated in writing on one sheet of foolscap—no longer—and bring it to me yourself."

Then the President can ask this official about details and, thus, in an hour, inform himself to the extent of all material the Government can supply. Next he can call in persons with special and practical knowledge, trustworthy and informed business men or labor leaders as the nature of the case requires. Finally and most important of all, he can send for professors in colleges and universities who have made the study of that particular subject their life work.

All will come at the call of the President. Thus he can check up his data and get every point of view. The best minds and ripest thought of the whole nation are his—a tremendous asset of knowledge and wisdom. So in less time than it takes a senator or a representative, a writer or student, even to ferret out what and where is the material he must

get hold of and study, the President can have all the facts, verified and reverified, as well as all shades of instructed opinion.

Then comes the task of decision, the supreme requirement of the Presidency, and, be it repeated, also its crowning attraction. Indeed, this is true of every form of leadership; and it is the gift of decision —for it is a gift—that makes and marks the executive in any field.

Decision must be made promptly but never hastily. This requires not leisure but concentration and swift, clear, accurate thinking. Such intellectual quality has always distinguished successful administrators. Napoleon or Washington in war, Morgan or Harriman in business, Cleveland or Roosevelt in statesmanship are examples.

They and men like them decided quickly yet considered maturely. They consulted with competent and trustworthy advisers but when they consulted they consulted—they did not take conversational rambles all around Robin Hood's barn. They asked for opinions and got them—then they decided and acted.

Moreover the President must be alert—calm and steady, of course- but alert. He must know what is going on. That is part of his business. And he must have foresight, too, which is also a gift much

like the gift of decision, though simpler. Indeed foresight is the realizing of inevitable results of any given deed, act or event.

It is nonsense for any President to say that he was unaware of what was happening in his administration or that he did not foresee consequences. To have knowledge and exercise foresight are parts of his job.

Of course he must have courage too—utter fearlessness—and profound honesty, intellectual honesty, public honesty, wide-awake honesty, honesty in the very fibers of his being; and absolute devotion to the common good. These things are taken for granted—they go without the saying.

And another gift he must have—that of the management of men, the sympathetic understanding of human reactions, that combination of the come-hither and thou-shalt in personality, which wins and compels human beings in the mass and individually.

PRESIDENT AND CONGRESS

This brings us to relationship of President with Congress and the legislative powers he may exercise. The Constitution specifically endows him with large legislative powers, such as the veto of bills and rec-

ommendation of legislation. But his actual power is far greater than that given or contemplated by our fundamental law.

For instance when, in spite of the Constitution, political parties sprang up as was inevitable, the President became the leader of his party which, of course, was also inevitable. Presidential party leadership is wholly antagonistic to the spirit and form of our fundamental law, the theory of which is that our Chief Magistrate shall be President of the whole American people and above faction. He still is, to be sure, but the constitutional ideal is impaired by the fact that the President is regarded as, and actually is, the head of the political organization to which he belongs.

As such he can dictate, in practical effect, what Congress shall or shall not do at times when his party is solid and well disciplined. This was notably the case when Jefferson was President. A recent example is the dominance of Mr. Wilson over Congress.

With one or two exceptions McKinley was able to do about what he liked with the legislative branch, although he managed to want what his party in Congress wanted. Roosevelt often forced a reluctant and resentful House and Senate to enact his measures, and this, too, at a time when Congress was

led by very able and uncommonly strong men. One of the most potent of catchwords is the familiar one of "Stand by the President."

Presidential overlordship of the national legislature can be exercised only by a powerful character or one gifted with extraordinary craft, or both; and even with such a man in the White House, party solidarity must be so great as to admit of party discipline. On the other hand, with a commonplace President, party unity, regimented by strong and skilful leaders in House and Senate, can produce what seems to be harmonious "team-work" by the executive and legislative branches.

Moreover a President on good terms with congressional leaders can often kill bills by private talks with those leaders and frequently does so. Or he can make a bold personal appeal to Congress, a sort of combined threat and persuasion, in which case it comes down to a question of who has most "nerve," Congress or the President, or else which best reflects public opinion.

As party lines weaken, presidential influence over legislation also weakens—the President is without the advantage of a compact and militant party following. This has happened several times in our history and is inevitable when no one great elemental issue divides the people such as union or

disunion, sound money or free silver, protection or free trade and the like.

In the last campaign an issue of this quality did arise in the question of going into or keeping out of European politics; but the proposal by a President elected by anti-League votes, that we go into a part of the League, the so-called World Court, has greatly confused that issue so that no single difference of policy that flames to the sky to be seen of all men, now divides American political parties.

Thus, as everybody knows, some Democrats in Congress are for Administration measures and some Republicans against them—an absurd, politically dishonest and well-nigh unintelligent condition.

The same thing has happened in England where there are four or more political groups instead of two political parties. Thus comes the Labor Government which, in fact, is a coalition that can and will last only so long as the Liberal and Labor members of Parliament hang together. There as here no understanding and over-shadowing issue divide parties. There as here, too, there might have been such an issue.

Even with our relaxed and, seemingly, dissolving party situation a President may influence Congress in determinative fashion; but this can be done only by appealing directly to the people, capturing the con-

fidence of the country, demanding of Congress compliance to the popular will.

Jackson did just that and so did Roosevelt. It always is possible though risky, and the President who attempts it must hazard mightily—"shake the iron hand of Fate," as Kipling puts it. He must be a supremely puissant and engaging personage of such stature, brilliance and command that the nation will respond to and follow him. Appeals to the country by smaller men always fail, sometimes in humiliating fashion. Thus Andrew Johnson's "swing around the circle," was absurd and well-nigh pitiful.

Presidential suzerainty of Congress in legislation is as real as it is non-constitutional, or to be more technically exact, extra-constitutional. That is, the Constitution does not provide for such executive dominance, does not contemplate it. Still it exists. The party system started it and practical necessity developed it.

For instance, such a thing as "Administration measures" are unknown to our fundamental law—in fact are negations of the Constitution. Yet, as a practical matter, we have them and must have them. Legislation has become so complex and specialized that some bills are and of necessity must be prepared by appropriate executive departments.

Moreover Congress has become so large in num-

bers as to be unwieldy and slow acting; and the public demands quick results. From all the causes mentioned in the last several paragraphs, Executive power over legislation has grown far beyond the dreams of "the Fathers."

On the other hand, the President has certain constitutional powers which have decayed from disuse. For example, he can adjourn Congress when the two Houses can not agree upon a time of adjournment. But no President ever has done this although appeal was made to President Wilson to adjourn the Houses; and Chief Justice Taft relates that when he was President the Democrats were fearful that he would adjourn Congress after it passed the Canadian reciprocity bill.

But it is doubtful whether any President would now exercise this power—as a practical matter it probably is an atrophied power, although in theory it remains in full effect. So we see again how our basic law expands and contracts with the growth and needs of the nation.

The fact that Congress, or one House thereof, may be controlled by one party and the President belong to the opposing party usually means that little legislation can be enacted. Appropriation and uncontested bills are about all that can become laws during such a deadlock.

But this result is not so bad as, at first, it seems to be. Especially in the present period of over-legislation, it has its advantages—unnecessary laws can not be passed, a fact over which Mr. Taft justifiably chuckles, when commenting on this situation.

APPEAL TO THE COUNTRY

In this respect, as in many others, the American President is unlike the British Prime Minister who is the head of a governing cabinet which, as Bagehot says, is merely "a committee of the legislative body selected to be the executive body." In theory the Prime Minister is appointed by the King, but in reality he is chosen by his party in the Commons or by a majority thereof as at present.

So long as the majority supports "the Government," as the Prime Minister and his cabinet are called, he can, of course, put through any law he likes or, indeed, do pretty much as he pleases in executive as well as legislative matters. He is boss of everything, but always with a sword of Damocles hanging over his head—the sword of the loss of his parliamentary majority. When that sword falls, off goes his official head and another is chosen who can command a majority of the Commons.

But though both Senate and House were opposed to an American President, he can block all legislation

unless two-thirds of each House should overrule him. A British Prime Minister may dissolve Parliament and appeal to the electorate of the United Kingdom and if sustained by the election of a new Parliament that will support him, he is, in practical effect, omnipotent for the time being; but if defeated the Prime Minister falls and a new "government" is formed by a new Prime Minister.

So can our President appeal to the country at any time or all the time, but only in the manner of creating public sentiment not registered in votes, which public sentiment influences Congress in a psychological but very real fashion. To be sure the President can ask the people to elect a friendly Congress but only once in every two years, unlike the British Prime Minister who can go to the country whenever he likes.

Strangely enough while our people welcome and respond to presidential appeals on great questions and Congress yields to the general opinion thus created, our people resent presidential mandates to elect a Congress of the President's party. They object, too, to such a demand for the election of a particular representative or senator in Congress. They appear to regard admonitions of this kind as interferences with their voting rights, as indeed they are.

No matter how unfavorable or even hostile the popular verdict at a congressional election, our President still remains President with full constitutional powers—his extra-constitutional influence over Congress is destroyed, that is all. He can go on managing our foreign affairs, directing our army and navy, making appointments and the like.

WAR AND ITS DECLARATION

He can not declare war as the British Cabinet can, but he can do things or refrain from taking measures that create a situation plunging us into armed conflict. In the "protection of American interests," as it is styled, an exceedingly vague and indefinite duty, the President can easily embroil us.

Or by formal neutrality but unequal treatment of belligerents he can induce attack upon us; or by suffering violation of American rights from one quarter, encourage the same thing from another quarter.

In short there is practically no end to the ways by which a President can get us into war. He can, indeed, commit an act of war, as was done in the case of our "punitive expedition" into Mexico in 1916 or the occupation of Vera Cruz in 1914 although in that unfortunate military gesture the Senate passed a sustaining resolution simultaneously with

the entrance of our warships into that Mexican harbor.

How any affair that may plunge us into hostilities shall be handled is purely a matter of presidential discretion—a matter of judgment. Prudence or rashness, daring or timidity, prompt firmness or hesitant uncertainty, tact or blundering, address or crudity, exclusive devotion to America or foreign favoritism, all enter into the President's decisions.

But, as has been said, while a President can get us into war or, in large measure, keep us out of war, he can not declare war or state the reasons therefor. The Constitution bestows that solemn and tremendous authority on Congress and on Congress alone; and that body has never yielded a particle of it and surely never will. Yet the President can veto a declaration of war, but never has done so—another atrophied power.

Under the Hague Convention of 1907, Congress must announce in its declaration of war the reasons therefor. Presidential statements of reasons for declaring war have no legal quality whatever—they amount to no more than an individual opinion, except as the President's official position gives his opinion more public weight than the views of a private citizen.

Still his power to bring war about is well-nigh

illimitable—a fact that can not be stated too often, so vital is it. The testimony of so eminent and careful a scholar as the late Professor Dicey of England illustrates this point in startling fashion:

"Mr. Wilson, though he could not technically declare war himself, could certainly, as we know by experience, determine whether war should or should not be declared, and fix, according to his own judgment, the date at which the United States should become the enemy of the German Empire."

Once formally engaged in hostilities, the President, as Commander-in-Chief of the Army and Navy, can order our forces hither and yon as he pleases. When the country is at war, his military power is absolute. He can appoint and remove generals and admirals, direct operations or even take personal command himself.

Also he can suspend operations, agree to armistices, admit defeat or fix terms of victory—although, most fortunately, any treaty of peace must be ratified by the Senate, as all the world knows and has known since our Government was established.

Stupendous as are the constitutional "war powers" of the President his unconstitutional powers are still greater, such as censorship, suppression of free speech and press and other constitutional guar-

antees. The refusal of these rights depends on the public temper.

If, by well-known methods, public passion can be sufficiently aroused, there is simply no boundaries to what a popular "war President" can do. For the time being he is literally dictator and can say in the words of Louis XIV "I am the State" and of his successor, "after me the deluge."

As a matter of sheer constitutionality it is doubtful in the extreme whether a President can lawfully suspend the writ of habeas corpus. But Lincoln did it, although over violent protest of ardent Union men. Precedent has, perhaps, established this peremptory denial of one of the fundamentals of free institutions, as a legal exercise of executive "war power," but only within the area of military operations or adjacent thereto.

The President can receive or reject all diplomatic or consular officials and agents of other Governments. He can send any of them home, too,—demand their recall or order them to leave. Even ambassadors have been handed their passports, each time for good cause. A gravely delicate business, this, yet not overdone.

Indeed a little more firmness might, perhaps, not hurt us or impair relations of sound and honorable friendship with other nations. At the present mo-

ment we are afflicted with and submit to foreign propaganda which no other Government would tolerate for an instant; and knowledge abroad that their diplomats here must watch their step would, at least, not tend to encourage propaganda activities.

We want to be friends, the closest possible friends, with all other countries, but we object to being "worked" as the saying goes; and our real friends will respect us all the more if we politely decline to be so used. Also we play no favorites, as Washington and all our foremost statesmen warned us not to do.

TREATY MAKING

Since treaty making has recently engaged our attention, let us note the power of the President in that respect. He can negotiate a treaty and that is all he can do about it until the Senate has passed upon it, unless in the meantime he withdraws it from the Senate. Indeed in the Constitutional Convention it was first proposed that the Senate alone should make treaties and also appoint ambassadors, but this was changed for the present arrangement.

When the President arranges the international contract, he must submit it to the Upper House of Congress. Unless and until the Senate approves that contract, it has no binding force, legal, moral

or political, on the American Government, nation or citizens.

It is like a mortgage written out and agreed to by attorneys but not signed by the parties, or at least by one party. After the Senate has amended or ratified a treaty, the President can drop the whole matter, or exchange ratifications, in which case the treaty becomes the supreme law of the land.

Because these treaty provisions of our fundamental law are peculiar to the American Constitution and because they are the outstanding feature as to foreign affairs of our system of government, foreign statesmen, scholars, publicists, diplomats and journalists are and always have been more familiar with the American treaty-making plan than with any other part of our Constitution. Indeed, they know and always have known more about it than some of our own public men.

The pretense that foreign statesmen supposed that our President could bind us by signing a proposed treaty and were surprised and shocked that our Senate could amend or reject it was sheer buncombe. They know all about the power of our Senate over treaties and always had known all about it. They merely tried to "put one over on us," by pretending ignorance; and they came very near succeeding.

When the Senate passes upon a proposed treaty it performs the most important and the only definitive function that any branch or official of our Government can perform. For a treaty, when ratified and ratifications exchanged, can not be altered or got rid of in any way except by executive denunciation, which is exceedingly dangerous and seldom done; or by consent of the other nation or nations signing the treaty which, of course, amounts to a new treaty in practical effect.

To be sure Congress can repeal a treaty to the extent that it is municipal law—that is, treaty provisions "prescribing a rule by which the rights of the private citizen or subject may be determined," such, for example, as those "in regard to rights of property by descent or inheritance, when the individuals concerned are aliens," as the Supreme Court defines domestic law often covered by international compacts.

While Congress can pass a law negativing such treaty provisions, it has rarely done so, and it would appear that this power is in the process of atrophy. But in other respects a treaty is a fixed, permanent inflexible contract during the time named in the treaty as the period of its existence.

Thus a senator when voting to ratify, amend or reject a treaty acts as a trustee of the whole nation now and for many years to come—sometimes

forever. So he must examine the proposed international contract with painstaking care, consider it with utmost deliberation and from every possible point of view and decide with absolute independence of all earthly influences.

A senator who would vote for or against a treaty as a party matter, because the President who negotiated it belongs to his or the opposing political party violates the spirit of the Constitution and is faithless to his oath of office.

This is a point of first importance, since treaties were never made "administration measures" until in recent years, when both a Democratic and a Republican President tried to line up and largely succeeded in lining up senators of their respective parties in support of treaties negotiated by them.

This is a new and a very serious development of presidential influence, and one which if not soon definitively negatived will radically change, not only the unbroken custom of a century and a quarter, but our whole constitutional theory and practise of treaty-making.

So we should never try to hurry the Senate to action on a treaty, since once ratified, it is permanent as described, unlike an Act of Congress which can be amended or repealed at any time as constantly happens and has happened thousands of times.

For that reason it is not, perhaps, objectionable to press Congress to pass a law and for the same reason wrong and perilous to rush the Senate into ratification of a treaty—we can quickly get rid of the law if it turns out badly, but we can not without difficulty and danger get rid of a treaty no matter now much we may come to dislike it.

Even without negotiating a treaty the President can fasten a foreign policy on the country, although, perhaps, not irrevocably. This can be done by means of "diplomatic correspondence"—the exchange of notes between our Secretary of State and foreign ministers. For example, John Hay did this in the matter of McKinley's Chinese policy.

It is a method often used abroad of late, when Governments for sufficient reasons do not wish to make formal treaties. Diplomatic memoranda are exchanged, thus obviating the necessity of filing treaties with the Secretariat of the League of Nations as required by the League Covenant. These "memoranda" are treaties in every sense—they are merely called something else.

The President must interpret treaties and in this way, among others, he must and does formulate foreign policies. These may or may not bind the nation, though it is embarrassing and difficult to change a policy once defined and followed. Here is

a vague but actual power of first consequence and great delicacy.

RECOGNITION OF FOREIGN GOVERNMENTS

Then, too, the President can recognize or refuse to recognize a foreign Government and no power can compel him to do either. This is a matter of prodigious concern to the American people since it affects our foreign trade and trade opportunities and even may embroil us in war.

The President is supposed to be guided by international custom in recognizing or refusing to recognize other Governments; but he need not do so. For example, it is none of our business what form of government any country adopts or how that Government obtained power.

We recognized the revolutionary régime of France in 1790 and, more than a century later, took no notice of the revolting double murder by which the present King of Servia was placed upon the throne—the father of the present monarch. On the other hand we refused to recognize Huerta because of his alleged complicity in the killing of Madero; and we decline to recognize Russia on the ground, as stated in substance by Mr. Hughes, that the Soviet Government is trying to overthrow our Government.

Yet Great Britain, Italy and Sweden have recog-

nized the Soviet Government. So we see that reasons for recognition are viewed differently by different nations.

The appointment of ambassadors is one of the weightiest matters in the hands of the President. Here again our institutions are the reverse of those of other nations, since they have a permanent diplomatic service composed of men carefully selected in youth, thoroughly trained and promoted on merit from the humblest secretarial position to the most exalted ambassadorship;. whereas our ambassadors are changed whenever a new party comes into power.

Since women have been placed on political equality with men we may expect a woman to be made ambassador one of these days—an experiment not without reason. Certainly we would not be any worse off than we have been, speaking by and large; for we seldom have won a diplomatic victory in fact, no matter how attractively the outcome of our diplomatic engagements have been represented to us. Indeed, one of the favorite strings played upon by our opponents is, through one of our national susceptibilities, to make us think we have won, when, in reality, we have lost.

In this respect, also, American interests largely depend upon the judgment of the President. Also the welfare of the country in domestic affairs is

determined in no small measure by his wisdom in making appointments.

THE CABINET AND POWER OF DISMISSAL

Take the Cabinet. As such, it is unknown either to the Constitution or the statutes, although heads of departments are provided for by law. But the Cabinet, as such, is exclusively the creation and creature of the President. By custom, it meets twice a week, yet the President need not call it together at all. He can, should and does consult his Cabinet and individual members of it, but he is not obliged to do so.

In short these men are, in legal effect, merely agents of the President. Their acts are his acts.

Even the Secretary of State is no more than the representative of the President in charge of foreign affairs; and the President can dismiss this head of his Cabinet or any member of it without assigning cause and even without cause.

Yet the Cabinet has grown to be—indeed, was from the beginning—a vastly important part of our government mechanism. The members of it should be the very ablest men to be found in the President's party and men, too, who have the complete confidence of the country. A powerful Cabinet can go far to make up for the deficiencies of a weak President and afford added strength to a strong President.

Excepting only justices of the Supreme Court of the United States and other federal judges, the President can dismiss any official he appoints. He appoints by and with the consent of the Senate in most cases, but he can dismiss without the advice and consent of the Senate in any case.

This exclusive power of dismissal was sharply disputed in the Senate during the first Congress; and denied by law to President Johnson. But the consensus of opinion now is that removal is an exclusively executive function. President Jackson removed everybody he could lay his hands on, and let Congress howl.

Anybody can see at a glance the vast potentialities for good or evil in this presidential prerogative. Domestic administration and foreign relations are thus in the President's hands in a most direct, intimate and vital fashion. Moreover he can name certain presidential agents as his personal representatives without consulting anybody—at least this has been done. Here is a practise not yet conceded by all, on which the Senate should keep a watchful eye.

JUDICIAL APPOINTMENTS

By far the most important duty and power of the President is the appointment of a Chief Justice of the United States, of associate justices of the

Supreme Court and of judges of inferior federal tribunals, for these men are the interpreters of the Constitution and the laws; they hold office for life if they wish and can not be removed except by impeachment, which can only be for indictable offenses.

The National Judiciary, especially the Supreme Court with its definitive power of judicial review, is the king-bolt of our whole American scheme of republican government. Upon the popular confidence in and respect for national courts depend the stability of our institutions and the security of our rights of person and property.

So these officials should be picked with infinite care and with regard only to their fitness and to that alone. Even federal district and circuit judges should be learned and experienced publicists as well as profound lawyers; and the Chief Justice of the United States and associate justices of the Supreme Court should have the qualities of statesmanship quite as much as qualities of jurists of the first rank.

So far-reaching is the presidential power of judicial appointment that, in the absence of any commanding issue, the most hardened partisan would be justified in voting for the presidential candidate of the other party, if he believes that candidate, as President, would make better judicial appointments than the candidate of his own party.

To appoint or refuse to appoint justices or judges for factional reasons, to place on the bench a man because of personal friendship or obligation of any kind is a betrayal of the country and a moral crime against the people. For the Senate to confirm such appointments is no less unworthy.

Thus, in this rapid and incomplete survey of the powers, duties and potentialities of the American President, we have reached his highest function, that of judicial appointment.

Throughout all his deeds and words runs the fascinating but awful power of decision. Whether in formulation of policies or appointment of officials, whether in interpretation of treaties, management of foreign affairs, direction of military and naval forces, recommendations to Congress or what not, the President must decide—always he must decide.

In this is the lure of the Presidency, in this the responsibility, in this the potentialities of good or evil for the whole country, every man, woman and child in it and generations yet unborn.

So "Mr. President" is the most exalted of human titles, and in the hands of the man on whom it is bestowed largely rests the destiny of the American nation.

VI

THE SUPREMACY OF THE SUPREME COURT *

The Judgment of the Masses: Free Institutions and a Public Appeal: the Curse of the Times: the Judicial Negative: Amendments and Assaults.

EVERYTHING human or of human contrivance must maintain itself on its merits and on its merits only. This applies to governmental institutions as much as to other devices of man. None is static. Each must meet or repel challenge or give way and go down just as the order it overthrew succumbed when that order was challenged and could not sustain itself.

Only the final opinion of the people is determinative of the continuance of any institution. Our Constitution itself rests solely upon the confidence of citizens. And just so the power of courts is, at bottom, sustained by the common judgment of the masses, and by that alone.

* Address before Annual Meeting of the New York State Bar Association, New York, January 18, 1924.

So we lawyers, who are preëminently the champions of the American Constitution and of all American institutions, must meet assailants of them before the bar of public opinion. We are no privileged order endowed with divine authority to decide among ourselves what is best for America.

Our cloistered councils never reach the public ear. Our learned papers, valuable and informing to the profession as they are, never are heard by the man in the field, factory or store; and if they were broadcasted to the millions, would be no more understood than if spoken in Sanscrit.

APPEAL TO THE PEOPLE

Our opponents who would radically alter vital American institutions make no such tactical error. They go directly to the people and speak in terms that the people understand. We must also go directly to the people and speak in terms that the people understand.

We must confound fallacy with truth stated so simply that the average citizen can comprehend. If we do not, if we surrender the public forum, adduce no evidence, present no argument and even fail to make appearance, the court of public opinion will enter against us judgment by default.

The founders and builders of the nation understood and practised this basic truth of free institutions. They knew that it was not enough for them to formulate and construct systems and policies on right principles; but that they must also explain their work to the people.

The Federalist is an outstanding example of such public appeal. Alexander Hamilton expounded the elements of foreign statesmanship even to hostile and violent mobs on the streets and in halls here in New York. Washington's Farewell Address was made to the country. The immortal opinions of John Marshall, state papers all of them, were written for the general citizenry of the whole nation. Abraham Lincoln spoke always to the common ear.

These men were not willing that the evil or misguided should monopolize the attention of that tribunal of last resort, the American public. They did not abuse, they reasoned; they did not denounce, they taught; they did not arouse passions; they appealed to common sense; they scorned sentimentality and instead relied on facts—but they spoke to the people, always they spoke to the people.

To-day we lawyers must follow the course of these preëminent Americans, the obvious course of common sense. Henceforth and until the present crisis

is past—for we are at the beginning of a crisis—every lawyer must be a public advocate speaking whenever and wherever he can get the chance to groups of voters for the cause of the Constitution and the courts—the cause of American institutions, all American institutions, not merely some American institutions.

The meetings of every bar association in the Union must be made occasions for public appeal with rostrums so high and sounding boards so resonant, that the people can hear; and what is said must be so clear and plain that the layman will understand and so friendly and attractive that he will listen.

For instance, one of the many grave questions before the country at present is whether the principle of judicial review shall be continued or modified or abandoned altogether. It needs no argument to convince lawyers that the well-being of the American people and the perpetuity of American institutions—even the life of the Republic—require that the courts shall exercise this power unimpaired, and especially that the supremacy of the Supreme Court of the United States shall be maintained.

But we lawyers are not the whole people and it is the voters who must be satisfied. When enough of them think that the courts, and definitively, the Supreme Court, should not declare legislation un-

constitutional, power to do so will be stripped from every tribunal in the land.

So our job is cut out for us. The appeal of American lawyers is to American electors. This must be my excuse for stating again to-night some elementary truths which to you lawyers are twice-told tales, but with which the new generation of citizens at large are, perhaps, not so familiar.

EXCESS LEGISLATION

At the outset we have a strategic advantage—everybody agrees with us that America is afflicted by a plague of laws. The whole country suffers from an epidemic of legislation. The whims of mere groups are registered in hasty statutes. The mass of enactments are beyond the human mind to know, much less to understand.

The most accomplished lawyer can not possibly comprehend the Niagara of legislation that pours upon the country in ever-swelling volume. Decisions from hurried and harried courts add to the legal flood that deluges the land. Yet the distressed, frightened and mystified citizen is not excused from observance of countless legalities of the very existence of which he is in total ignorance.

Bureaus, boards and commissions grind out

thousands of bureaucratic rules, regulations, interpretations and requirements which, in practical effect, have the force of law. The statutes that authorize this bureaucratic legislation are often the children of hurry and rush, with declamation for the midwife.

The curse of the times is not only the superfluity of legislation enacted in haste but often of trashy legislation enacted in terror of vociferous and threatening groups—legislation enacted in defiance of the ordinances of nature and without a thought of the fundamental law of nation or state.

So the need of the times is not the denaturing of courts that interpret laws and uphold constitutions but rather the moderating of legislative bodies that manufacture laws and ignore constitutions. The public interest would be better served if legislators would put upon themselves the restraints of study, foresight and prudence in those immense fields of legislative discretion in which the Constitution gives law-makers a free hand.

Yet the people are told that the cure for too much legislation is more legislation; that the remedy for over-government is additional government; that legislators shall no longer be guided and restrained even by constitutions; and that courts, the Supreme Court of the United States in particular, shall no

longer shield citizens from legislative assaults upon rights guaranteed by the basic law of the Republic.

The people are told that instead of more restraint, Congresses and legislatures should be released from all restraint; that the permanent will of the people expressed in Constitutions should be subject to any demand of a transient minority group which, for the moment, can coerce with political threats the people's temporary representatives.

If this were done we would, of course, have still more legislation. If, even with constitutional limitations, we have too many laws, is it not obvious that, without constitutional limitations, we would have many additional laws?

If courts were denied the duty and power of maintaining the Constitution against legislative enactments that violate it, the myriads of statutes, rules and regulations that already distract us would be increased; the bureaus, boards and commissions which already make our American bureaucracy the greatest and most costly the world ever has seen would be multiplied; government officials, agents and employees now more numerous and expensive per capita than those of Russia under the Czar or Germany under the Kaiser would be added to by scores of thousands—and taxes would be raised accordingly.

JUDICIAL REVIEW EXCLUSIVELY AMERICAN

Judicial negative of unconstitutional enactments is an American principle—purely and exclusively American. Over and over and over again the American people must be reminded of that important fact; and reminded, too, that destruction of that destinctively American principle would be the extreme of reactionism.

Doubtless those who thus seek the practical overthrow of the Supreme Court of the United States sincerely feel that they are the exponents of modern thought; whereas the historical fact is that they are the advocates of an ancient idea. They believe themselves liberal, but, in this particular at least, they are reactionary.

Whence came the theory that mere legislation is sacrosanct and that the sole function of courts is to apply it? The source of that doctrine is the obsolete institution of absolute monarchy. Laws then were the will of the King, courts then were the creatures of the King; and of course the King's edicts could not be set aside by the King's agents. That is the origin of the doctrine of judicial dependence and servility, which doctrine, by the inertia of habit, was carried over to the era of parliamentary omnipotence under an unwritten Constitution.

In place of this archaism springing from the age of autocracy, a new thought was conceived and brought forth in a new land, untrammeled by unhappy inheritances; and this new thought became the soul of our distinctive American institutions of orderly freedom. That child of liberty and law is the idea of the maintenance by courts of the permanent will of the people established and ordained in a written Constitution which states in express terms that it is and forever shall be the supreme law of the land.

This is the genesis of the American principle of judicial supremacy which it is now proposed to abandon for judicial subserviency born of monarchical theory and practise. To make that change would be to go backward, not forward; to adopt an antique form and reject a modern method.

We lawyers and all informed persons must go to the people with these historical and historic facts. Moreover, once again and as often as needful to make the truth known, citizens must be told the difference between the definitive popular will embodied in the people's permanent Constitution on the one hand and, on the other hand, expedients of the moment embodied in statutes passed by the people's constantly changing representatives and instantly repealable by other temporary representatives of the people.

We must constantly tell the people just what their Constitution is—that it is the people's law, written for the people, adopted by the people, operating on the people, protecting the property, liberty and life of the people individually and collectively. And we must point out to the people that the people's fundamental law should never be changed except by the people.

CONSTITUTIONAL AMENDMENTS

If the Constitution has one serious defect, that defect is that it permits ratification of amendments not only by state conventions elected solely for the considering of a constitutional amendment but also by state legislatures elected solely for the making of state laws. Alterations of the people's basic charter should be sanctioned only by conventions chosen by the people for that express and exclusive purpose and no other.

If the people's Constitution was, itself, adopted by the people in this way, additions to the people's Constitution should be made in the same way and in no other way unless, perhaps, by direct vote of the people at the polls.

Ratification of amendments to the people's Constitution by legislatures elected for other tasks and subject to group pressure and particular influences,

is out of date, non-public and non-popular—a method that removes as far from the people as possible the people's control of the people's basic, permanent law, instead of bringing as near to the people as possible the people's control of the people's basic, permanent law.

Could the present condition of state legislatures—the multiplicity of their labors, the complexity of their problems, the haste of their proceedings and all the familiar elements of their composition to-day—have been foreseen it is reasonably certain that power to ratify or reject constitutional amendments would not have been given them, but that this vital function would have been confined to the other agency provided in the Constitution, specially elected state conventions.

Hereafter let us employ that better and more popular method. Hereafter let us elect state conventions after thorough public debate on the single issue of the proposed amendment—state conventions like those which ratified the Constitution in the first place, whose one and only duty will be the mature consideration of that subject alone and no other. Constitutional amendments are not mere experiments as are most statutes, easily repealed if they are found to be unworkable or unwise.

That is why waves of emotion or schemes to meet

temporary emergencies should not be fastened upon the fundamental law of the Republic. That is why constitutional amendments should be made only when indispensable to the enduring welfare of the whole American Nation. And that is why the people's deliberate and definitive judgment should be registered as directly as practicable on the vital and permanent necessity of proposed alterations of the people's Constitution.

Also, in amending our Constitution, we must have in mind the capacity of the country to absorb and assimilate additions to the people's fundamental law. The Constitution must be kept so simple and so brief that citizens can know the obligations, rights and methods it prescribes. We must not so overload it with amendments that the people will have constitutional indigestion as they now have statutory gastritis.

THE ASSAULT ON THE SUPREME COURT

Yet more amendments to the Constitution are now proposed; and one amendment is being passionately urged which would revolutionize our American system of law-regulated liberty—a constitutional amendment to abolish the exercise by the Supreme Court of the United States of the American principle of judicial review.

Those who cherish that principle and who think this assault upon it a mere flurry soon to blow over, are like sentinels asleep at their posts. Already it amounts to a movement, a movement led by sincere, able and determined men, a movement not to be overcome by mere denial of its existence.

Those who believe in the American principle of judicial review must demonstrate anew to the people the wisdom and usefulness of that principle; must show the benefits of that principle to the people themselves; must answer the arguments of those who seek to overthrow that principle.

I repeat that if we would save the American Constitution from mutilation we must go to the people who alone have power to preserve, modify or destroy it.

We must remind the people of the unanswered and unanswerable reasons for the supremacy of the Supreme Court over unconstitutional legislation—the inevitable conflict between temporary enactments and the enduring Constitution, the inescapable necessity of an impartial arbiter of that conflict, and the irremovable fact that either statute or Constitution must dominate the other.

Some deciding power must settle such controversies. What power shall it be? The Constitution gives that august authority to the one agency

of our Government that is above the mutations, punishments or rewards of politics, safe from the vengeance or blandishments of Presidents or Congresses, beyond the clamor or passion of the hour—the Supreme Court of the United States.

Can any other organ be devised or imagined so appropriate and capable, so free from prejudice, so impartial and so just? If so what is it? Nobody ever has suggested it. Is it not fair to ask judicial iconoclasts what plan they propose to take the place of the one they would annihilate?

In and out of season, ever, always and without ceasing, we must remind the people of the elemental truth that freedom of speech, press and peaceable assembly, security of person and property, safety from punishment for constructive treason, liberty of religion, and every privilege dear to all of us, is assured by the people's Constitution and by that alone.

Which would the people rather trust to preserve and protect those blessings, Congress or the Supreme Court of the United States? That is the whole question in a nutshell. Let each citizen answer it for himself and the supremacy of the Supreme Court is secure. And let us see to it that every man and woman does answer that question for themselves.

SUPREMACY OF THE SUPREME COURT

The people are told that the Constitution does not give the Supreme Court power to annul acts of Congress that violate the people's fundamental law; that such authority was refused in the Constitutional Convention; and that the Supreme Court "usurped" that power. But these assertions, however sincerely made, simply are not so.

THE MODERN TENDENCY

Scholars are agreed that the Convention understood that the Supreme Court would have this power inherently and of necessity. That was why no proposal was made in the Convention either to give or deny the Supreme Court this authority. If every necessary inference to be drawn from every provision of the Constitution had been written into that instrument it would not have been a Constitution but a code, not a clear-cut statement of principles but a voluminous legal treatise.

In the very first case that came before the Supreme Court involving an Act of Congress not authorized by the Constitution, the Supreme Court upheld the people's permanent fundamental law as against the unconstitutional statute, *even though, in doing so, the Supreme Court yielded power which the Act of Congress attempted to confer upon it.*

That was not grasping usurpation but self-denying

duty, not tyranny but reason, not judicial autocracy but judicial statesmanship.

The people are told that in no other country, even in those with written constitutions, are the courts permitted to annul legislation; but the people are not told that in no other written constitution is it expressly declared that that constitution is the supreme law or law at all, as is stated in terms in the Constitution of the United States; the people are not told that, in spite of this vital difference between the American Constitution and foreign constitutions, the highest courts of other countries are beginning to apply the American principle of judicial review; the people are not told that the strong and growing tendency throughout the modern world is away from legislative autocracy and toward the American idea of constitutional limitations, applied by independent courts; and the people are not told that in America, liberty, property and the rights of minorities are safeguarded as in no other extensive and populous country in the world.

It is said that England with an omnipotent parliament whose acts no court can annul, proves the value and safety of unlimited legislative power. But has the test of legislative supremacy yet been made in that country? Authoritative writers tell us that the protection of liberty, property and minority

rights in that hitherto favored land has been largely due to the foresight, moderation and restraint of England's traditional statesmen.

But, in domestic affairs at least, the influence of these men is rapidly passing—ten years at most will see the last of it. Then we shall learn the effect of supreme and unguided legislative dominance, then we shall know the fate of individual liberty, private property and minority rights in England—then, when the impulse, whim or passion of momentary majorities is instantly expressed in acts of parliaments which no power can question, deny or resist.

So, as yet, English experience affords no precedent for us, because in England experience of unregulated democracy is still to come. When the tale is finally told and ultimate comparisons made, the probabilities are that, with all its defects, the American system of government, the heart of which is supremacy of the Supreme Court of the United States, will be found to be the best for the preservation of human rights and the administration of justice, ever conceived and devised by the sagacity and prevision of man.

CONGRESSIONAL CONTROL

Others who refuse to go the whole length of abolishing by constitutional amendment, the supremacy of the Supreme Court, would yet provide

that the constitutional power and duty of that tribunal shall be limited by statute. But that means amendment of the Constitution by Act of Congress—a contradiction in terms. The mere statement of the proposition answers it.

If Congress can say that its acts must stand unless seven out of nine justices of the Supreme Court declare them unconstitutional, Congress can, of course, say that eight justices or the whole nine justices must concur—or that a minority may annul legislation or that objection of a single justice shall be sufficient, or that the court shall not act at all.

If Congress can make quantitative requirements of the Supreme Court it can prescribe any quantity or none.

Perhaps those who advance the idea of congressional quantitative control of judicial decisions urge it, not with expectation or desire to have it adopted, but rather as a means of expressing public resentment to five-to-four decisions of grave constitutional questions involving definitive national policies; and of thus admonishing the Supreme Court to strive to avoid such close divisions with their unhappy effect on general opinion. If this is the real purpose of the quantitative Supreme Court bills now before Congress, the result may be beneficial.

For if no more five-to-four decisions are made for

a long time agitation against that practise will cease—it is concrete action, not academic theory, that stirs the public. It is the fact that in the last five years, more national laws have been overthrown by a judicial majority of one, than were thus annulled during the whole previous one hundred and twenty-nine years of our history, that has aroused public opposition to "the one-man rule" as the popular saying brands these five-to-four nullifications of Acts of Congress.

If these judicial pronouncements continue with like frequency, the certain consequence will be, not congressional quantitative enactment which the Supreme Court ought to and surely would unanimously ignore, but heavy increase of public disapproval, thus strengthening the already strong and wide-spread sentiment for a constitutional amendment abolishing the principle of judicial review altogether.

REMEDIES

The only men who can deal with the situation are the justices of the Supreme Court of the United States. It is for them a matter of policy, not principle, a matter of sound judgment and common sense, not a question of abstract right and wrong. The occasion requires judicial political sagacity and

the sympathetic understanding of normal human reactions—in short, judicial statesmanship.

Members of the Supreme Court of the United States should not only be great lawyers but also profound publicists and accomplished politicians in the higher sense of that misused word. Statesmanship means the distinguishing between mere gales of public sentiment on the one hand and definitive public judgment on the other hand—and resistance to the one when wrong and, unless a fundamental principle is involved, acceptance of the other, whatever the statesman may think of its merits.

If we who believe the principle of judicial review to be invaluable and indispensable get into the obstinate and ossified state of mind of the old-time Federalists who stood for an incident as stoutly as they championed a cause, we will suffer their fate. He is a poor lawyer that will not yield an unimportant point to gain his case.

Moreover, is there not reason for the Supreme Court, except by more than a bare majority, to refuse to annul an Act of Congress when embodying a settled national policy? Such judicial act is not alone the decision of a mere private lawsuit; it is also the adjudication of a public controversy.

It involves a national law, and when four out of nine able, learned and impartial justices believe that law to be harmonious with the Constitution, should

not the remaining five justices hesitate to overthrow it as though that public law were no more than a private contract?

Perhaps the justices might agree among themselves that they will not invalidate an Act of Congress unless two-thirds of them agree that it is unconstitutional—surely the overthrow of a national statute is as important as a verdict of guilty in an impeachment trial or the rejection of a presidential veto, each of which requires a two-thirds majority. Would not all of us prefer decisions of the Supreme Court to be unanimous or by decisive majorities?

Annulment of national laws only by the concurrence of six justices would not mean minority decision as in litigation between mere individuals, since such annulment negatives a majority of the House, negatives a majority of the Senate, negatives the judgment of the President—or, if disapproved by him and re-enacted over his veto, negatives the two-thirds majority of both Houses.

And such decisive judicial action would take from the hands of the enemies of the Supreme Court their principal argument and most effective weapon. It would go far to mollify public opinion which, in modern times, no earthly power can safely affront. "The public-be-damned" period in human affairs has passed away. The divine right idea is extinct.

If this course is not the most expedient, let a

wiser method be adopted. I care not what policy is employed so that the principle is preserved. Perhaps reargument in all constitutional cases where, on the first hearing, the Court finds a five-to-four decision likely, would change that unfortunate condition.

At any rate, a public announcement by the Court that, in all such doubtful situations, such cases must be twice argued and twice considered, would make annulment of laws even by a judicial majority of only one justice far more acceptable to the public mind and conscience.

Whatever is done, if anything ought to be done, can only be done by the Supreme Court itself. The responsibility is upon the shoulders of the members of that great tribunal; and with faith in their public wisdom, whatever procedure they adopt we will support, for in their power to annul unconstitutional legislation abides the perpetuity of American institutions.

At bottom, ours is a government by public opinion. History and human nature alike prove that moderation and reasonableness are the only methods that can guide it aright. When these normal and wholesome means are not used; when, instead, either obstinate silence or mere denunciation —or still worse, autocratic repression—are practised,

the inevitable result is the growth of the very sentiment thus opposed.

American institutions, the integrity and unity of the nation, the property, freedom and all rights of citizens are secure only so long as the American Constitution, upheld and executed by independent and impartial courts, protects them. Constitution and courts are challenged to-day not by demagogues alone, not only by the sincere and misinformed, but also by able and determined men who believe that the American system is no longer suitable to modern conditions.

Danger is not imminent but comes apace, and surely will arrive unless we who believe in American institutions take the field of public discussion in defense of them against their assailants. Now is the time for us to make public appeal. Let us avert the peril at its inception rather than await the fullness of its strength when opposition will be harder if not futile.

The hour has struck for us to go forth among our fellow citizens and demonstrate to all the people that their well-being requires the preservation of the integrity of the American Constitution and the maintenance of the Supremacy of the Supreme Court of the United States.

THE END

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